

**INTERNATIONAL REFUGEE LAW IN EUROPE AND THE
TEMPORARY RELOCATION SCHEME: ON DURABLE
SOLUTIONS FOR THE REFUGEE CHILD DURING
THE REFUGEE CRISIS**

by

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DECLARATION


I, **Crystal Difford**, student number 58556915, declare that '**International refugee law in Europe and the temporary relocation scheme: On durable solutions for the refugee child during the refugee crisis**' is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I have not previously submitted this work, or part of it, for examination at UNISA for another qualification or at any other higher education institution. I have also obtained Ethical Clearance for this study, the reference number being ST94 on the Ethical Clearance Certificate dated 26 July 2016.

Signature: 

Date: 10 September 2017

Supervisor: Ms Lee Stone

Signature: 

Date: 10 September 2017

DEDICATION

This work is dedicated to that little boy whose death made the whole world sit up a little straighter in their chairs. And to the refugee children I met these last two years who experience entirely new cultures, languages and expectations but who continue to see a brighter, safer future.

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LIST OF ACRONYMS AND ABBREVIATIONS

BIA	<i>Best interests assessment</i>
BID	<i>Best interests determination</i>
CEAS	<i>Common European Asylum System</i>
CRC	<i>Convention on the Rights of the Child</i>
CRIA	<i>Child Rights Impact Assessment</i>
CRIN	<i>Child Rights International Network</i>
EASO	<i>European Asylum Support Office</i>
ECHR	<i>European Union Convention for the Protection of Human Rights and Fundamental Freedoms</i>
ECJ	<i>European Court of Justice</i>
ECtHR	<i>European Court of Human Rights</i>
ECOSOC	<i>United Nations Economic and Social Council</i>
ETS	<i>European Treaty Series</i>
EU	<i>European Union</i>
EURODAC	<i>European Dactyloscopy</i>
EWCA	<i>England and Wales Court of Appeal</i>
FRA	<i>European Union Agency for Fundamental Rights</i>
IGCR	<i>Intergovernmental Committee on Refugees</i>
IJCR	<i>International Journal of Children's Rights</i>
ILJ	<i>International Law Journal</i>
IRO	<i>International Refugee Organisation</i>

LNTS	<i>League of Nations Treaty Series</i>
OJ	<i>Official Journal</i>
TEU	<i>Treaty on European Union</i>
TFEU	<i>Treaty on the Functioning of the European Union</i>
UN	<i>United Nations</i>
UNICEF	<i>United Nations Children's Fund</i>
UNHCR	<i>United Nations High Commissioner for Refugees</i>
UNRRA	<i>United Nations Relief and Rehabilitation Administration</i>
UNTS	<i>United Nations Treaty Series</i>

SUMMARY

This study explores the international obligations of the European Union to the unaccompanied asylum-seeking and refugee child. In doing so, it involves an investigation into the concept and content of durable solutions for the refugee child. As such, it analyses the effect of the temporary European relocation scheme in the search for durable solutions. To that end, it engages a comprehensive explanation of the relevant refugee law, the law of the rights of the child and the European legislative framework governing the reception and protection of refugees. Cumulatively, an assessment is made as to the effectiveness of the durable solutions that currently exist. This study seeks to establish whether, in an attempt to relieve the pressure from the frontline member states by creating a system for effective integration, Europe encourages the development of a children's rights perspective and ultimately, provides a path for the unaccompanied child's development and self-fulfilment.

Key Words

Children's rights; Child asylum seeker; Child refugee; Durable solutions; Temporary European relocation scheme; Convention on the Rights of the Child; Unaccompanied child; European Union; Refugee crisis; Refugee law

Chapter One: Introduction and context

1.1 Introduction

The immense media and social media coverage of the death of three-year old Syrian child, Alan Kurdî on the shores of Bodrum, Turkey brought the plight of Syrian nationals desperately fleeing to Europe into sharp focus worldwide.¹ In addition to the vast number of adult asylum seekers arriving daily, there are also a vast number of minor children – either unaccompanied or accompanied by parents or adult family members – that enter Europe seeking international protection. According to data provided by the European Commission, of over one million refugees arriving in Europe by sea in 2015, a staggering 314 873 were children.² The independent migration of children has become a worldwide phenomenon. There has been a six-fold increase in the number of unaccompanied children applying for asylum in Europe in the last nine years. In 2014, the number of unaccompanied child applicants was 23 150. That number reached 95 205 unaccompanied children in 2015.³ While the migration of these children is similar to that of adults in many ways, they are still foremost, children. Their protection requires a higher standard of quality and safeguards. This poses very real challenges to the member states of the European Union (EU). They have to identify the unaccompanied child, provide adequate reception facilities for children and initiate proceedings to find durable solutions in addition to efficiently processing the high number of adult asylum seekers. There is an immense pressure on resources to process children from providing proper care at reception centers, to conducting thorough best interests assessments, to tracing family and thereafter, deciding on a durable solution in the best interests of the child. Undoubtedly, member states' facilities and resources were not prepared for the massive escalation in applications by children.

¹ The Guardian 'Shocking images of drowned Syrian boy show tragic plight of refugees' <https://www.theguardian.com/world/2015/sep/02/shocking-image-of-drowned-syrian-boy-shows-tragic-plight-of-refugees> (Date of use: 8 March 2016).

² European Commission 'Compilation of data, situation and media reports on children in migration 2017' 21 http://ec.europa.eu/newsroom/document.cfm?doc_id=44146 (Date of use: 24 April 2017).

³ Eurostat 'Annual data: asylum applicants considered to be unaccompanied minors by citizenship, age and sex' <http://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database> (Date of use: 16 August 2017).

Germany, for example, went from processing 4 400 asylum applications by unaccompanied children in 2014 to 22 255 applications in 2015.⁴

1.2 Framing the European-specific child-rights perspective

Concerns about children in migration has generated considerable discussion and debate in Europe, particularly because the risks that these children are exposed to rests on their vulnerability. The vulnerability of children has been recognised at international law since the end of the First World War,⁵ where thousands of children were orphaned, killed or left to fend for themselves. That recognition has evolved over the years to the point where children are now regarded as independent and autonomous holders of rights and duties. To this end, the international community has adopted the Convention on the Rights of the Child⁶ (CRC). The specific application of this international instrument to children reflects the United Nations' acknowledgement that children are entitled to special care and assistance.⁷ Moreover, children's protection is primarily viewed from the perspective that the family is a fundamental group of society and the natural environment for the growth and well-being of children.⁸ UNICEF accurately covers the situation thus:

For a global community committed to reaching the children left furthest behind, the double vulnerability of being both a migrant and a child makes the equity case for protecting children all the more urgent.⁹

An unaccompanied child is 'a person under the age of eighteen' who is 'separated from both parents and is not being cared for by an adult who by law or custom has responsibility to do so.'¹⁰ The child in this situation does not have the support and care of his or her family and thus, relies on the member state to stand in and provide

⁴ Eurostat 'Annual data: Unaccompanied minors' [footnote 3].

⁵ See the first legal recognition of the particular vulnerability of children in the 1924 Geneva Declaration of the Rights of the Child League of Nations OJ Spec. Supp. 21 43.

⁶ 1989 Convention on the Rights of the Child 20 November 1989 1577 UNTS 3.

⁷ Fourth paragraph in the Preamble to the CRC [footnote 6].

⁸ Fifth paragraph in the Preamble to the CRC [footnote 6].

⁹ UNICEF 'Uprooted: The Growing Crisis for Refugee and Migrant Children' 14-15 https://www.unicef.org/publications/index_92710.html (Date of use: 17 August 2017).

¹⁰ UNHCR 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' 1 <http://www.refworld.org/docid/3ae6b3360.html> (Date of use: 17 August 2017).

specialised care. In times of massive migration, as witnessed in 2015-2017, European member states have an even greater duty to uphold the obligations in the CRC, the EU Charter of Fundamental Rights¹¹ and other applicable EU directives and regulations. Child asylum seekers are, like adult asylum seekers, also subject to international, regional and national law relating to the provision of international protection. In the European context, this starts with the 1951 United Nations (UN) Refugee Convention¹² and the 1967 Protocol Relating to the Status of Refugees¹³ (1967 Protocol). The implementing regional legal framework is the Common European Asylum System (CEAS), a system of directives, some of which are relevant to children in migration. It is the regional legal framework that determines the extent to which member states exercise their national discretion.

1.3 Literature review

Indeed the foreigner, isolated from his fellow countrymen and his family, should be the subject of greater love on the part of men and of the gods. So all precautions must be taken in order that no wrong be committed against foreigners.¹⁴

Today, the fate of the refugee in Europe is determined in light of the global financial crises, economic cuts made by governments, rising unemployment, declining demographics, issues of national security, political and mutual respect of sovereignty, refugee xenophobia and sometimes blatant refugee non-admission policies and practice.¹⁵ The present study is an analysis of the European legislative framework in the international protection of unaccompanied child migrants. Since the CRC is the universal treaty relating to the protection of the rights of the child, this treaty provides the relevant framework for a detailed consideration of the obligations pertaining to

¹¹ 2012 European Union Charter of Fundamental Rights of the European Union 26 October 2012 2012/C 326/02.

¹² 1951 United Nations Convention Relating to the Status of Refugees 28 July 1951 189 UNTS 137.

¹³ 1967 United Nations Protocol Relating to the Status of Refugees 31 January 1967 606 UNTS 267.

¹⁴ Plato *The Laws* written 360 BC, cited by the Jesuit Refugee Service North America http://www.jrsusa.org/Education_Detail?CTN=E36263AC-875D-475E-AF1B-2B3E3569A829 (Date of use: 14 June 2016).

¹⁵ Islam R and Bhuiyan JH 'International Legal Protection for Refugees: Articulating Challenges and Options' in *An Introduction to International Refugee Law* (Martinus Nijhoff Publishers Leiden 2013) 1.

unaccompanied refugee children arriving in numbers in search of protection in Europe. For a refugee child, the CRC expects international protection to

contribute to the child's survival and development, protect his or her right to life, provide support for parents and caregivers, maintain respect for culture and religious origins, protect the child against all forms of exploitation, and ensure recognition of the child's right to a name, a nationality and an identity.¹⁶

The three principal fields of international refugee law, child's rights and the Common European Asylum System (CEAS) are separate, but highly interrelated fields. However, children's rights constitutes the *lex specialis* of the present study on the protection of unaccompanied minor refugees. What sets this study apart, though, is that it combines the theoretical legislative and policy background and real-life cases of child migrants, in an effort to promote a better understanding of the protection gaps and the decisive actions to fix the gaps and thus, ensure a better future for children. A primary motivation for the study is that the recent enactment of the temporary European relocation scheme, in addition to the normal functioning of the CEAS and particularly the Dublin III Regulation,¹⁷ has not afforded researchers time enough to discover the long-lasting impact it may have on the future development and integration of the migrant child. The present study intends to address this *lacuna*.

1.3.1 The Common European Asylum System in its Second Phase

In order to implement the 1951 Refugee Convention, the European Community established the Common European Asylum System (CEAS). The CEAS is a complex protection system, creating what has been described as a sinuous asylum process,¹⁸

¹⁶ Goodwin-Gill GS 'Unaccompanied refugee minors: the role and place of international law in the pursuit of durable solutions' 1995 *The International Journal of Children's Rights* 412.

¹⁷ Council of the European Union Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) 29 June 2013 OJ L180/31-180/59.

¹⁸ Stoyanova V, Bauloz C and Ineli-Ciger M 'Introducing the Second Phase of the Common European Asylum System' in Bauloz C *et al* (eds) *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System* (Brill Nijhoff Leiden 2015) 1-19, 1.

one which asylum seekers encounter soon after their hazardous journey to the EU. Article 78 of the Treaty on the Functioning of the European Union (TFEU),¹⁹ calls on the EU to establish the CEAS, which should comprise:

- (a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
- (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
- (c) a common system of temporary protection for displaced persons in the event of a massive inflow;
- (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
- (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
- (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
- (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.²⁰

Stoyanova *et al*/ state that the complexity of the CEAS stems from its rationale, scope and constant evolution.²¹ First, the rationale of the CEAS is a combination of member states' international obligations to establish and enhance asylum protection together with member states' policy interests in migration and asylum. Policy interests focus on four main objectives: to prevent the access of asylum-seekers to the EU, apply criminal sanctions and return those who are not entitled to international protection, take steps to integrate recognised refugees and finally, to prevent and combat the phenomenon of 'asylum shopping'.²² The fear on the part of member states, and therefore the major driving force when establishing a harmonised asylum system, is the secondary movement of asylum seekers to settle in the member states with the most generous

¹⁹ 2007 European Union Consolidated version of the Treaty on the Functioning of the European Union 13 December 2007 2008/C 115/01.

²⁰ Article 78(2) of the TFEU [footnote 19].

²¹ Stoyanova, Bauloz and Ineli-Ciger in *Second Phase 1* [footnote 18].

²² Chetail V and Bauloz C *The European Union and the Challenges of Forced Migration: From Economic Crisis to Protection Crisis* (Academic Report European University Institute 2011) 4.

asylum policies.²³ Second, the scope of the CEAS comprises several distinct yet cohesive directives and regulations: Asylum Procedures Directive,²⁴ Reception Conditions Directive,²⁵ Qualification Directive,²⁶ EURODAC Regulation²⁷ and the Dublin III Regulation,²⁸ which cumulatively give it its meaning and content. Stoyanova *et al* elegantly describes understanding the CEAS is

... like deciphering a musical score: although each individual note makes a particular sound, it is only [when] taken together that the greater composition can be played.²⁹

Third, the constant evolution of the legal instruments intensifies the complexity of the CEAS.³⁰ The CEAS underwent its first phase of development, to establish *minimum* standards in the field of asylum, in the 1999 Tampere Presidency conclusions³¹ and its second phase, to establish *common* standards in the field of asylum, between 2011 and 2013. Given such a high level of complexity in a regional refugee protection system, coupled with other systems in the field of migration control, such as visa requirements

²³ Paragraph 55 of European Commission Completing the Internal Market White Paper from the Commission to the European Council 14 June 1985 COM(85) 310 final; Stoyanova, Bauloz and Ineli-Ciger in *Second Phase* 3 [footnote 18].

²⁴ Council of the European Union Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) 29 June 2013 OJ L180/60-180/95.

²⁵ Council of the European Union Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) 29 June 2013 OJ L180/96-105/32.

²⁶ Council of the European Union Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) 20 December 2011.

²⁷ Council of the European Union Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) 29 June 2013 OJ L180/1-180/30.

²⁸ See footnote 15 above.

²⁹ Stoyanova, Bauloz and Ineli-Ciger in *Second Phase* 5 [footnote 18].

³⁰ Stoyanova, Bauloz and Ineli-Ciger in *Second Phase* 6 [footnote 18].

³¹ Council of the European Union Presidency Conclusions, Tampere European Council 16 October 1999 <http://www.refworld.org/docid/3ef2d2264.html> (Date of use: 13 July 2017).

for third country nationals,³² the Frontex-led interception of migrants at European shores,³³ and the externalisation of asylum processing in key migration transit countries,³⁴ it is no wonder it is again being labeled ‘fortress Europe’.³⁵

1.3.2 *Enactment of the temporary European relocation scheme*

The migrant crisis that the EU currently faces is one that brings along new challenges, particularly with regard to the procedures already in place. A number of respected international law experts have warned of the problems within the EU asylum procedure for years.³⁶ It is evident however, that despite the numerous warnings for more effective control, one that can handle the massive influx of asylum-seekers, the EU found itself scrambling to find solutions for a crumbling system.³⁷ Indeed, the European Commission acknowledged that

³² European Parliament Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) 15 July 2009; Council of the European Union Council Regulation (EC) No. 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (consolidated version as to 1 May 2004) 14 March 2001 No. 539/2001.

³³ Council of the European Union Council Regulation (EC) No 2007/2004 of 26 October 2004: Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 26 October 2004; Council of the European Union Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union OJ L 189/93 27 June 2014.

³⁴ European Commission ‘Communication from the Commission to the Council and the European Parliament on regional protection programmes’ 1 September 2005 COM (2005) 388 final <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0388&from=en> (Date of use: 13 July 2017).

³⁵ A phrase with Nazi Germany roots (*Festung Europa*) to “communicate fears that the European Union is or might become a self-contained bloc of nations increasingly impervious to penetration by goods, services or people coming from the outside world.” See Teasdale A and Bainbridge T ‘The Penguin Companion to European Union’ https://penguincompaniontoeu.com/additional_entries/fortress-europe/ (Date of use: 11 January 2018).

³⁶ See for example Islam R ‘Origin and Evolution of International Refugee Law’ in *An Introduction to International Refugee Law* (Martinus Nijhoff Publishers Leiden 2013) 19-26; Wilson G ‘The United Nations Security Council and Refugee Flows as “Threats to the Peace” in Bhuiyan and Islam (ed) *An Introduction to International Refugee Law* (Martinus Nijhoff Publishers Leiden 2013) 268-269; Goodwin-Gill 1995 *IJCR* 405-406 [footnote 16].

³⁷ European Commission ‘Compilation 2017’ 23 [footnote 2].

across Europe, there are serious doubts about whether our migration policy is equal to the pressure of thousands of migrants, to the need to integrate migrants in our societies, or to the economic demands of a Europe in demographic decline.³⁸

Even though the CEAS provides a complex system of protection to address all facets of migration, it was not equal to the task of effectively processing the huge number of arrivals in 2015. It is thus vital to set out a brief explanation of the systems in place, the systems that failed and the hurried mechanisms implemented.

When there is an incredible surge in the number of asylum applications, like in 2015 and 2016 with 1.3 million each year,³⁹ the first point of pressure is the mechanism provided by the Dublin III Regulation.⁴⁰ At any given time, during which there is no emergency situation, Dublin III requires that the particular state where an asylum seeker first enters the EU, is the member state responsible for registration, fingerprinting and processing of the application for international protection.⁴¹ Once an asylum seeker has been registered, should he move onto another member state in a 'secondary movement', the second state can return the person to the first state in what is called a 'Dublin transfer'.⁴² The asylum seeker is only provided with the right to legally reside in the country of first reception and thus, cannot move to another EU country without authorisation.⁴³ This mechanism is designed to prevent asylum seekers from asylum shopping.⁴⁴ It became clear however, that most asylum seekers traveled by boat across the Mediterranean Sea and that the frontline member states – Greece, Italy and Hungary – faced 'unprecedented pressure'.⁴⁵ An *ad hoc* solution would have to be found to better control the influx of asylum seekers. In response, the EU implemented, among others, a system of relocation of asylum-seekers from the frontline member

³⁸ European Commission 'A European Agenda on Migration (Communication)' COM (2015) 240 final 2 http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf (Date of use: 9 May 2016).

³⁹ Eurostat 'Asylum Statistics' http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics (Date of use: 18 July 2017).

⁴⁰ See footnote 17 for the full reference.

⁴¹ Article 20 of the Dublin III Regulation [footnote 17].

⁴² Article 26 of the Dublin III Regulation [footnote 17].

⁴³ Article 18 of the Dublin III Regulation [footnote 17].

⁴⁴ Chetail and Bauloz *Challenges of Forced Migration* 4 [footnote 22].

⁴⁵ European Commission 'Agenda' 4 [footnote 38].

states to other member states of the EU. The rationale is the show of concrete solidarity between the member states and a fair sharing of the burden between states.⁴⁶

The European Commission launched the reformation of the migratory legislation to relieve the pressure on the frontline member states with the adoption of the European Agenda on Migration in May 2015.⁴⁷ As part of the concrete actions outlined by the Agenda, the Commission proposed that Article 78(3) of the TFEU be triggered, in order to adopt the provisional measures required to relieve the emergency situation.⁴⁸ Article 78(3) provides:

In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

Finally, in September 2015, the Council of the EU adopted the ‘temporary European relocation scheme’⁴⁹ under Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (the September Decisions). The temporary European relocation scheme aims to relocate those whose asylum applications have a chance of successfully being processed, within the meaning of the Qualification Directive,⁵⁰ from Greece and Italy to other member states where their application will be processed. Member states have, as a result, undertaken to relocate 40 000⁵¹ and 120 000⁵² people

⁴⁶ European Commission ‘Fact Sheet: Refugee Crisis – Q&A on Emergency Relocation’ [http://europa.eu/rapid/press-release MEMO-15-5698_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5698_en.htm) (Date of use: 18 July 2017).

⁴⁷ See footnote 38 for full reference.

⁴⁸ European Commission ‘Agenda’ 4 [footnote 38].

⁴⁹ European Commission ‘Agenda’ 19 [footnote 38].

⁵⁰ See footnote 26 for full reference.

⁵¹ Article 4 of the Council of the European Union Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece 152.

⁵² Article 4(1) of the Council of the European Union Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece 28.

respectively. The Dublin system however, remains the baseline system and thus, relocated asylum seekers obtain legal residence in the country of relocation and will be returned thereto in the case of secondary movement.⁵³

1.3.3 Problem statement

It has only been in the last several years and especially, since the start of the refugee crisis, that European bodies have really focused on the protection gaps in the field of migration. It started with the Action Plan on Unaccompanied Minors (2010-2014),⁵⁴ to raise awareness on the protection needs of unaccompanied minors and to promote protective actions. The publication of the European Agenda on Migration (the Agenda) and the continuous assessment of its implementation has also provided the opportunity to pay attention to the individual member states actions in the protection of unaccompanied children. With the increased number of migrants arriving in Europe and the growing pressure on facilities, the temporary European relocation scheme was enacted as an emergency procedure. Nevertheless, during the 10th Annual European Forum on the rights of the child focusing on the protection of children in migration,⁵⁵ the call for targeted actions to better protect these children persisted. In April 2017, the European Commission presented its communication on the protection of children in migration⁵⁶ to reiterate the main challenges and to set out targeted actions that need to be taken or better implemented by the European Union and its member states.

There has however, been little focus on the unity of the asylum, protection and refugee system for the unaccompanied child. It is no doubt simpler to concentrate on the separate parts of the asylum system in the European Union as they relate to the child. The challenge is that every part of the protection system should be cohesive and flow,

⁵³ European Commission 'Q&A on Emergency Relocation' [footnote 46].

⁵⁴ European Commission 'Action Plan on Unaccompanied Minors (2010-2014)' COM (2010) 213 final https://ec.europa.eu/anti-trafficking/eu-policy/action-plan-unaccompanied-minors-2010-2014_en (Date of use: 24 April 2017).

⁵⁵ European Commission '10th Annual European Forum on the rights of the child: the protection of children in migration' 29-30 November 2016 http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=34456 (Date of use: 17 August 2017).

⁵⁶ European Commission 'The protection of children in migration' COM (2017) 211 final https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170412_communication_on_the_protection_of_children_in_migration_en.pdf (Date of use: 6 June 2017).

individual steps contributing to the next step and ultimately, a durable solution. The process starts from the moment the child is identified as unaccompanied by the member state authorities, to ascertaining whether there is family legally present in Europe and thereby determining the member state responsible for the asylum application, to the formal best interests determination to find a durable solution. The role of the temporary European relocation scheme in the search for durable solutions has received little attention. The Committee on the Rights of the Child (the Committee), a body set up to carefully monitor the implementation of the CRC by the States parties, called, from the very first,⁵⁷ for the development of a children's rights perspective in law and policy, to shift children from the perception that they are immature and vulnerable to one where they are viewed as holders of rights, able to influence their own life.⁵⁸ Of the children who need this, asylum seeking children need this the most. More importantly, the CRC clearly obligates member states to respect and protect the rights of all children within their territories, regardless of a child's background or migration status.⁵⁹

1.4 Purpose statement

The purpose of this thesis is to explore the international obligations of the EU to the unaccompanied asylum-seeking and refugee child. In doing so, the study will investigate the concept and content of durable solutions for the refugee child and thereafter, the effect of the temporary European relocation scheme in the search for durable solutions. To this end, the study will engage in a comprehensive explanation of the relevant legal regimes, namely refugee law, the law pertaining to the rights of the child, and the European legislative framework governing the reception and protection of refugees. Cumulatively, an assessment will be made as to the effectiveness of the durable solutions that exist with respect to the protection of the refugee child. This study

⁵⁷ Recital 23 of the UN Committee on the Rights of the Child 'General comment no. 1 (2001): The Aims of Education' 17 April 2001 CRC/GC/2001/1 http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11 (Date of use: 11 January 2018).

⁵⁸ Recital 12 of the UN Committee on the Rights of the Child 'General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child' 27 November 2003 CRC/GC/2003/5 <http://www.refworld.org/docid/4538834f11.html> 3 (Date of use: 12 May 2016).

⁵⁹ Article 2 of the CRC.

seeks to establish whether in the attempt to relieve the pressure from the frontline member states by creating a system for effective integration, Europe encourages the development of a child's rights perspective and ultimately, provides a path for the unaccompanied child's development and self-fulfillment.

1.5 Methodology

The comprehensive approach of this thesis will juxtapose the legal framework against the reality faced by refugees, with particular reference to unaccompanied children. As part of the study, the historical development of international refugee law will be explored and show that this development still has impact in the current day. This will require a historical research component. Thereafter, an evaluative and expository research method will be employed to test whether the law works in practice in the current day. The research will also cover the tug-of-war between the ideological perspectives such as the nationalistic versus international perspectives. The key sources used in this study will be decisions, directives, regulations, European case law and other official documents published by the European organisations. In addition thereto, I made use of books, journal publications and other reliable published items. This is a primarily desktop-based research study.

1.6 Limitations of the study

The European Parliament has recently proposed extending the relocation scheme until the new Dublin Regulation is adopted.⁶⁰ Since its adoption in September 2015, the monitoring and evaluation of the effect of being relocated is generally scant. The advantage the children possess however, is their resilience and no doubt, many have adapted quickly to their new environment and started planning for their future.⁶¹ It seems, though, that there is no need for the further pressure on their resilience and

⁶⁰ European Parliament 'EP urges EU countries to speed up relocation of refugees, particularly children' <http://www.europarl.europa.eu/news/en/press-room/20170511IPR74349/ep-urges-eu-countries-to-speed-up-relocation-of-refugees-particularly-children> (Date of use: 7 September 2017).

⁶¹ Wenke D, Pàmias J and Costella P 'RESILAND: Orientations for professionals and officials working with and for children on the move' 13 http://www.resiland.org/files/small_booklet_res.pdf (Date of use: 6 February 2018).

adaptive skills when, with their participation, they will feel empowered to identify the member state to which they wish to be relocated and the reasons for this choice. Such a positive involvement at the beginning of the long process will be invaluable for their later development and integration.⁶² This research is more theoretical in application, using an example of a theoretical child in the system. Where real life examples have been used, usually in a discussion of the Dublin III system, the internet-based research has been a limiting factor. This does not deter further research, and perhaps personal interviews with the children who are the subject of this thesis. There are these gaps in the protection of unaccompanied children in Europe, but the member states are not blind to them and the communication by the European Commission on the protection of children in migration is evidence of that.⁶³ Some of the focus by the European Commission has also been touched on in this study, namely: providing adequate reception centres, swift and effective access to status determination procedures like the use of the relocation process, ensuring durable solutions, respecting and guaranteeing the best interests of the child and effective use of data, research, training and funding.

1.7 Structure of the study

The study commences with a brief history of the evolution of international refugee law, including the various influences that have led to the so-called Eurocentric definition of the refugee and the continual tug-of-war between the respect for human rights and the pursuit of national interests, like migration control.

Chapter three focuses on the Convention on the Rights of the Child and its extreme importance in protecting the refugee child. The chapter will traverse the four pillars that make up the foundation of the CRC and informs all legislation, decisions and policy relating to the child, with particular focus on the refugee child.

Chapter four examines the search for and content of durable solutions. The incredible importance of establishing durable solutions for the refugee child will be examined, from

⁶² Wenke, Pàmias and Costella 'Orientations' 19 [footnote 61].

⁶³ European Commission 'Protection' [footnote 56].

the moment they enter Europe until the time that a more permanent solution can be found for the full development and happiness of the most vulnerable member of society.

Chapter five traverses the temporary relocation scheme, the decisions and discussions leading up to the implementation thereof, the focus on children and whether the temporary scheme works towards establishing durable solutions. The chapter will also cover the actions taken by the member states in terms of the temporary relocation scheme.

Chapter six brings the study to a conclusion, covering the current need for durable solutions for the refugee child and indeed, that durable solutions are not only the endgame.

Chapter Two: The evolution of international refugee law and the child's rights within this sphere

2.1 Introduction

There are two international instruments currently regulating refugee law namely, the 1951 United Nations Refugee Convention and the 1967 Protocol Relating to the Status of Refugees (1967 Protocol).⁶⁴ The preamble to the 1951 Refugee Convention establishes a strong link between the fundamental human rights of all persons and international refugee law.⁶⁵ The preamble considers that the profound concern for refugees has manifested on various occasions and to that end, endeavours 'to assure refugees the widest possible exercise of these fundamental rights and freedoms.'⁶⁶ To extend the scope of international protection, international cooperation is required between states themselves and between states and the UN's refugee agency, the United Nations High Commissioner for Refugees (UNHCR).⁶⁷ To support and streamline international cooperation, the UN considered it desirable to consolidate previous piecemeal refugee agreements into one new, binding agreement.⁶⁸ Constituting the universal, binding agreement protecting refugees, the 1951 Refugee Convention defines a refugee as per Article 1A(2) is a person who

... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

On the face of it, and with the present refugee crisis in mind, this definition seems to be constructed in broad terms, including a wide variety of reasons for persecution.

⁶⁴ See footnotes 12 and 13 for full reference.

⁶⁵ Islam in *Origin and Evolution* 34 [footnote 36].

⁶⁶ Second paragraph in the Preamble to the 1951 Refugee Convention.

⁶⁷ Resolution 2 of the 1950 UN General Assembly Resolution 428 (V) Statute of the Office of the United Nations High Commissioner for Refugees 14 December 1950.

⁶⁸ Third paragraph in the Preamble to the 1951 Refugee Convention.

However, in examining the developmental history of the definition, it becomes clear why it is constantly criticised as being legalistic, narrow and Eurocentric.⁶⁹ There has been much criticism about the construction and content of the legal instrument itself and also of states' reluctance to uphold the duties contained within it.⁷⁰ These problems have persisted and been further highlighted since the sharp increase in the number of migrants arriving in Europe.

Given the exponential increase in the number of refugees seeking protection and the fact that a relatively high number of those are unaccompanied minors, it is thus important to consider the history and development of the relevant treaties to be able to evaluate the position of the refugee child within international refugee law. To this end, the focus will be on the major legislative events that have informed the definition of who qualifies for refugee status, to better understand the criticisms levelled at the definition.

2.2 The evolution of the definition of 'a refugee'

People fleeing their countries and mass refugee movements have happened since the very notion of a country was created. At the start of the 20th century, Europe experienced a rupture in its refugee movements during and after the First World War. Following the Russian revolution in 1917, masses of people of both Russian and Armenian origin were left without travel documents and could not leave the country of first reception once they had fled their country of origin. It was then that the international community stepped in and by means of *ad hoc* treaties and arrangements, identified these refugees as a certain group or category of people. States tended to conclude refugee treaties and arrangements in a piecemeal fashion, that is to say, as a particular refugee crisis arose.⁷¹ The two elements to be complied with in order to be categorised as a refugee and to receive identity certificates were first, the person had to be outside their country of origin and second, the legal protection of the government of that country

⁶⁹ See for example Islam in *Origin and Evolution* 19-26 [footnote 36]; Wilson G *Threats to the Peace* 268-269 [footnote 36]; Goodwin-Gill GS and McAdam J *The Refugee in International Law* (Oxford University Press Oxford 2007) 21.

⁷⁰ Islam and Bhuiyan in *Challenges and Options* 2 [footnote 15].

⁷¹ Article 2 of the 1928 Arrangement Concerning the Extension to Other Categories of Certain Measures Taken in Favour of Russian and Armenian Refugees 30 June 1928 89 LNTS 63 identifies persons of Assyrian, Assyro-Chaldaean, Syrian, Kurdish and Turkish origins as refugees.

had to have been denied to them.⁷² These elements are contained in the definition of a refugee as at 1926, which provides that a refugee is ‘any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Socialist Soviet Republics and who has not acquired another nationality’.⁷³ Hathaway classifies this as the juridical approach to the definition of a refugee. The purpose of this approach, when providing protection, is to facilitate the international movement of those who are unable to migrate further without identification documents.⁷⁴ In the case of Russians and Armenians, the definition of a refugee identifies a national or ethnic link, and that those persons are without *de jure* protection from their country of origin.⁷⁵ The juridical approach to categorising persons as refugees focuses on the consequence of a lack of *de jure* state protection – that masses of people were left without travel documents – rather than the cause of refugee-creation.⁷⁶

During the 1930s, the lack of *de facto* protection of those under Nazi rule in Germany and the systematic repression of Jews, led to the development of the 1938 Convention Regarding the Status of Refugees Coming from Germany.⁷⁷ The definition of a refugee took on a sociological approach, according to Hathaway.⁷⁸ This means that, in contrast to the juridical perspective, the purpose is to ensure the refugees’ safety or well-being, instead of attempting to correct an anomaly in the international legal system.⁷⁹ Protection meant more than merely providing travel documents; it meant right of residence and access to welfare and assistance in the country of refuge.⁸⁰ Article 1 of the 1938 Convention followed a similar construction with regard to the presence of the ethnic link element mentioned above, by identifying two categories of refugees, namely,

⁷² Goodwin-Gill and McAdam *The Refugee* 16 [footnote 69].

⁷³ Article 2 of the 1926 Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees 12 May 1926 LXXXIX LNTS 2004. Note that the definition of refugee also included people of Armenian origin under Article 2 of the 1926 Arrangement.

⁷⁴ Hathaway JC ‘The Evolution of Refugee Status in International Law: 1920-1950’ 1984 *International and Comparative Law Quarterly* 349.

⁷⁵ Islam in *Origin and Evolution* 16 [footnote 36].

⁷⁶ Hathaway 1984 *Law Quarterly* 367 [footnote 74].

⁷⁷ 1938 Convention concerning the Status of Refugees Coming From Germany 10 February 1938 CXCL LNTS 4461 59.

⁷⁸ Hathaway 1984 *Law Quarterly* 367 [footnote 74].

⁷⁹ Hathaway 1984 *Law Quarterly* 350 [footnote 74].

⁸⁰ Chapter VIII of the 1938 Convention Regarding the Status of Refugees Coming from Germany [footnote 77].

persons having possessed German nationality and stateless persons who used to be established in German territory. The focus here was the protection of persons who did not enjoy *de jure* and *de facto* protection from the government of Germany; in other words, a person as a member of a group who was a victim of events in his society.⁸¹

It was in 1938, at the Evian Conference in France, that the definition saw a move toward perceiving a refugee as an individual having irreconcilable differences with, or being incompatible with the government, rather than groups of people who were denied protection.⁸² This was identified as the individualist approach.⁸³ The concept of a refugee was fundamentally restyled by the primary objectives of the Intergovernmental Committee on Refugees⁸⁴ (IGCR). In this regard, the scope of the IGCR focused on

1. Persons who have not already left their countries of origin (Germany including Austria), but who must emigrate on account of their political opinions, religious beliefs and racial origin ...⁸⁵

Hathaway believes that the development of the definition toward the individualist perspective was innovative in that the IGCR was the first international body to recognise that persons still in their state of origin might qualify as refugees.⁸⁶ The refugee was now someone whose incompatibility with their government manifested in a conflict of religious views, political views and racial origins.⁸⁷

The refugee crisis after the Second World War saw the displacement of about 40 million refugees⁸⁸ – constituting an emergency situation – with states adopting temporary measures, that were mostly informed by national interests,⁸⁹ including the

⁸¹ Hathaway 1984 *Law Quarterly* 370 [footnote 74].

⁸² Islam in *Origin and Evolution* 16 [footnote 36].

⁸³ Hathaway 1984 *Law Quarterly* 350 [footnote 74].

⁸⁴ Goodwin-Gill and McAdam *The Refugee* 18 [footnote 69].

⁸⁵ Decisions Taken at the Evian Conference On Jewish Refugees <https://www.jewishvirtuallibrary.org/jsource/Holocaust/evian.html> (Date of use: 14 November 2016).

⁸⁶ Hathaway 1984 *Law Quarterly* 371 [footnote 74].

⁸⁷ Resolution 8(a) of the Intergovernmental Committee on Refugees Resolution Adopted 14 July 1938 <https://www.yadvashem.org/docs/evian-conference-decisions.html> (Date of use: 12 January 2018)

⁸⁸ Chalabi M 'What happened to history's refugees?' <http://www.theguardian.com/news/datablog/interactive/2013/jul/25/what-happened-history-refugees> (Date of use: 12 May 2016).

⁸⁹ Islam in *Origin and Evolution* 18 [footnote 36].

establishment of the United Nations Relief and Rehabilitation Administration (UNRRA).⁹⁰ The UNRRA was tasked with providing aid and repatriation of the displaced nationals of the 44 establishing states, but it had no true refugee mandate to resettle displaced persons to third countries.⁹¹ States soon realised however, that the scale of repatriation and resettlement could not be dealt with in a piecemeal fashion.⁹² There needed to be policies based on voluntary and humanitarian considerations to provide for refugee resettlement, instead of *ad hoc* policy development. With the establishment of the United Nations in 1945, the International Refugee Organization (IRO) sought to identify categories of people requiring assistance by examining the merits of each applicant's case.⁹³ As per Goodwin-Gill and McAdam, the IRO thus identified refugees as

victims of the Nazi, Fascist, or Quisling regimes which had opposed the United Nations, certain persons of Jewish origin, or foreigners or stateless persons who had been victims of Nazi persecution, as well as persons considered as refugees before the outbreak of the Second World War for reasons of race, religion, nationality, or political opinion.⁹⁴

This conception of refugee-hood is firmly rooted in the existence of persecution against the person seeking refuge.

Despite the efforts of the IRO, the refugee crisis persisted and what followed was the establishment of the UNHCR and a call for the tightening of the definition of refugee. Several states were in favour of a narrow definition of refugee under the new temporary agency and thereby a narrowing of the scope of duties.⁹⁵ A number of states insisted

⁹⁰ The UNRRA was established in the Agreement for United Nations Relief and Rehabilitation Administration on 9 November 1943 <http://www.ibiblio.org/pha/policy/1943/431109a.html> (Date of use: 12 January 2018).

⁹¹ Council of the UNRRA Resolution No. 10 'A Resolution Relating to Policies with respect to Displaced Persons' Appendix I Resolutions on Policy of the First Session of the Council of the United Nations Relief and Rehabilitation Administration 186-187 <http://ask.un.org/loader.php?fid=497&type=1&key=ad4b56d41d89da35ed13deae1ac96472> (Date of use: 14 November 2016); Islam in *Origin and Evolution* 18 [footnote 36]; See also Hathaway 1984 *Law Quarterly* 372 [footnote 74].

⁹² Islam in *Origin and Evolution* 18 [footnote 36].

⁹³ Hathaway 1984 *Law Quarterly* 377 [footnote 74].

⁹⁴ Goodwin-Gill and McAdam *The Refugee* 19 [footnote 69].

⁹⁵ Goodwin-Gill and McAdam *The Refugee* 20 [footnote 69].

on fiercely defending the principle of territorial sovereignty and restricting the criteria when identifying the beneficiaries of refugee status and local protection⁹⁶ with the purpose of preventing refugees becoming a liability to the international community.⁹⁷ The UNHCR was initially established with a temporary mandate of three years⁹⁸ to provide international protection to refugees and assist in voluntary repatriation, local integration or resettlement in third countries. This mandate and the life of the UNHCR has since been extended numerous times in order to uphold the humanitarian, social and apolitical considerations in the development of international refugee law. Indeed, the UNHCR has now become a permanent fixture in the UN architecture.

The UNHCR is guided by the 1951 Refugee Convention and the subsequently adopted 1967 Protocol. The work of the UNHCR is also guided by the UN General Assembly, the UN Economic and Social Council (ECOSOC), the Executive Committee of the High Commissioner's Programme together with the Global Objectives and Indicators of Progress of the UNHCR.⁹⁹ After years of dealing with refugee crises in a fragmentary fashion, the 1951 Refugee Convention was the first thorough attempt at establishing an international legal structure.¹⁰⁰ The definition of a refugee thus adopted in the 1951 Convention retained the individualist approach classified by Hathaway in 1984, with the consequence that in order to be deemed a refugee 'some specific singling out or individualization' was required.¹⁰¹ Originally, according to Article 1A, the term 'refugee' applied to any person who

(2) As a result of *events occurring before 1 January 1951* and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former

⁹⁶ Goodwin-Gill and McAdam *The Refugee* 15 [footnote 69].

⁹⁷ Goodwin-Gill and McAdam *The Refugee* 20 [footnote 69].

⁹⁸ The UNHCR was officially established by UN General Assembly Resolution 319(IV) Refugees and stateless persons 3 December 1949 A/RES/319.

⁹⁹ UNHCR 'Facts and Figures' <http://www.unhcr.org/3fc754593.pdf> (Date of use: 17 November 2016).

¹⁰⁰ Islam in *Origin and Evolution* 21 [footnote 36].

¹⁰¹ Crawford J and Hyndman P 'Three Heresies in the Application of the Refugee Convention' 1989 *International Journal of Refugee Law* 155.

habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it (own emphasis).

The 1951 Refugee Convention went further in Article 1B(1) to clarify that ‘events occurring before 1 January 1951’ was to be understood as

(a) events occurring in Europe before 1 January 1951; or

(b) events occurring in Europe or elsewhere before 1 January 1951, and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

The first observation to be made about this definition is that it continuously refers to a ‘person’ and ‘his’ or ‘himself’ which certainly implies the significant focus on individual determination of refugee-hood.¹⁰² Second, the temporal and an optional geographical constraint was evidently a way for states to limit their responsibilities to only those refugees generated by the Second World War and the Cold War. A number of states at the time of the drafting of the 1951 Refugee Convention were hesitant of assuming unforeseen future obligations and wished only to discharge their obligations to refugees already in their respective territories, thus the temporal constraint.¹⁰³ Geographically, the idea was that the refugees in Europe had suffered persecution by the denial of civil and political rights under the Nazi and communist regimes and that their disenfranchisement on the basis of race, nationality and religion required international protection. However, the violation and denial of basic rights such as food, shelter, health care and education was not included in the international definition of a refugee.¹⁰⁴ As Islam points out, this approach served a dual purpose: first, it allowed western states to provide international protection to European claimants and second, shield against most third world asylum seekers in the era of decolonisation.¹⁰⁵ Despite the assertion that the definition is restrictive, member states previously used the definition in support

¹⁰² Crawford and Hyndman 1989 *IJRL* 157 [footnote 101].

¹⁰³ Jackson IC ‘The 1951 Convention Relating to the Status of Refugees: A Universal Basis for Protection’ 1991 *International Journal of Refugee Law* 406.

¹⁰⁴ Islam in *Origin and Evolution* 23 [footnote 36].

¹⁰⁵ Islam in *Origin and Evolution* 23 [footnote 36].

of their own geopolitical interests by accepting as refugees persons who were denied their civil and political rights (the content of which was determined mostly by European states) and in turn, enabling judgment of the refugee-producing states in the political arena.¹⁰⁶ This was particularly true during the Cold War to condemn the communist states and to protect those persons whom the communist states refused to protect.

After several years, there was a distinct development of the 1951 Convention refugee definition. Its application became more universal which resulted in the drafting and coming into operation of the 1967 Protocol Relating to the Status of Refugees. It was agreed that the 1967 Protocol would remove the temporal and geographical constraints in the definition of a refugee in the 1951 Convention. The intention was to have the international refugee instrument apply to a wide-ranging purview of refugee-producing circumstances.¹⁰⁷ In particular, since the abolition of colonialism and the upset that followed the withdrawal of the colonial powers, there were a great number of refugee-producing states.¹⁰⁸ If the international law definition of a refugee was to retain its international character, the temporal and geographical constraints could no longer apply. The criticism is that the removal of these constraints was merely a formal removal and not a material, substantive removal.¹⁰⁹ The focus on the individual being incompatible with his government and the resulting persecution required by the definition endured and thus the Eurocentric interpretation of refugee-hood also endured.¹¹⁰

2.3 The parallel development of children's rights

Development in the recognition of the rights of the child occurred in parallel with the development of international refugee law, beginning just after the First World War. The League of Nations adopted the first Geneva Declaration of the Rights of the Child on

¹⁰⁶ Islam in *Origin and Evolution* 16 [footnote 36].

¹⁰⁷ Islam in *Origin and Evolution* 24 [footnote 36].

¹⁰⁸ The UN General Assembly identified the following among the root causes of refugee movements and reaffirmed the condemnation of 'policies and practices of oppressive and racist régimes, as well as aggression, colonialism, apartheid, alien domination, foreign intervention and occupation' in the 1981 UN General Assembly International Co-operation to Avert New Flows of Refugees 16 December 1981 A/RES/36/148 .

¹⁰⁹ Islam in *Origin and Evolution* 24 [footnote 36].

¹¹⁰ Islam in *Origin and Evolution* 24 [footnote 36].

26 September 1924.¹¹¹ The five-point document required that ‘men and women of all nations ... declare and accept it as their duty’ to protect, assist, relieve and provide for the well-being and development of children. Despite there being no reference to the rights of children as such, the 1924 Geneva Declaration was the first international human rights document to specifically address and affirm the rights of children.¹¹² Similarly, there is no specific mention of refugee children but the document, first adopted by the International Save the Children Union in 1923, was very much informed by the experiences of children post-First World War. Undoubtedly many of them were refugee children.¹¹³ The 1924 Geneva Declaration was once more approved by the General Assembly of the League of Nations in 1934.¹¹⁴

Following the Second World War, the UN General Assembly adopted the seven-point Declaration of the Rights of the Child in 1948.¹¹⁵ The General Assembly retained the five points from the 1924 Geneva Declaration and added two extra points calling for the protection of the child ‘beyond and above all considerations of race, nationality or creed’¹¹⁶ and ‘with due respect for the family as an entity.’¹¹⁷ These two points very clearly take into account the child victims of the Nazi regime and the devastating effects of the Second World War on families.¹¹⁸ The member states, by signing the 1924 and later the 1948 Declaration, were promising to incorporate the principles into their national laws but they were not legally bound to do so.¹¹⁹ The international community’s focus on protecting the rights and vulnerabilities of the child in a separate document was at a low point, due to the adoption of the Universal Declaration of Human Rights¹²⁰

¹¹¹ 1924 Geneva Declaration of the Rights of the Child League of Nations OJ Spec. Supp. 21 43.

¹¹² ‘Children’s Rights History: Historical Overview of the Children’s Rights Evolution’ <https://www.humanium.org/en/childrens-rights-history/> (Date of use: 13 January 2018).

¹¹³ ‘Geneva Declaration of the Rights of the Child, 1924’ <https://www.humanium.org/en/geneva-declaration/> (Date of use: 28 November 2016).

¹¹⁴ ‘Historical Overview’ [footnote 112].

¹¹⁵ ‘Declaration of the Rights of the Child – 1948’ <https://www.crin.org/en/library/un-regional-documentation/declaration-rights-child-1948> (Date of use: 29 November 2016)

¹¹⁶ Article 1 of the 1948 Declaration of the Rights of the Child [footnote 115].

¹¹⁷ Article 2 of the 1948 Declaration of the Rights of the Child [footnote 115].

¹¹⁸ Pobjoy JM ‘A Child Rights Framework for Assessing the Status of Refugee Children’ in Juss SS and Harvey C (eds) *Contemporary Issues in Refugee Law* (Edward Elgar Publishing Cheltenham UK 2013) 91-137 91.

¹¹⁹ Geneva Declaration of the Rights of the Child, 1924 [footnote 113].

¹²⁰ 1948 Universal Declaration of Human Rights 10 December 1948 Resolution 217 A (III).

on 10 December 1948. On one hand, it was argued that the Universal Declaration of Human Rights implicitly included children as holders of human rights deserving protection and there was, therefore, no need for a separate instrument; on the other hand, the Universal Declaration highlighted the shortcomings of the 1948 Geneva Declaration.¹²¹ Regardless, the UN Economic and Social Council (ECOSOC) called for

the preparation of documentation on the ... Geneva Declaration (1924), referring in particular to any changes or additions which it may be considered necessary to make with a view to its acceptance as the United Nations Charter of the Rights of the Child.¹²²

The Secretary-General, after consultation with member states and non-governmental organisations, agreed that a separate instrument should be drafted but that it should be a non-binding declaration and not a charter.¹²³ On 20 November 1959, the 1959 Declaration of the Rights of the Child¹²⁴ was adopted under Resolution 1386 (XIV) by the UN General Assembly, which non-binding instrument is still valid today. It is reasonably evident that the text of this document was the springboard for the development of the Convention on the Rights of the Child, with similar wording and underlying principles. The preamble to the 1959 Declaration succinctly sets out the rationale for the progress towards a separate instrument for the protection of children. It commences with the acknowledgement of faith in the fundamental human rights of all persons and carries on to state that, with the proclamation of the Universal Declaration of Human Rights, everyone is entitled to the rights and freedoms therein.¹²⁵ At this point, there is agreement that owing to the physical and mental immaturity and vulnerability of the child, children require further safeguards and care, as was first recognised in the 1924 Geneva Declaration.¹²⁶ Interestingly, by recognising that

¹²¹ 'Declaration on the Rights of the Child, 1959: About the Declaration' <http://www.humanium.org/en/childrens-rights-history/references-on-child-rights/declaration-rights-child/> (Date of use: 29 November 2016).

¹²² Paragraph 25c(ii) of UN Economic and Social Council Resolution E/578. This paragraph contains a quote taken from Office of the UN High Commissioner for Human Rights under the heading 'Legislative History of the Convention on the Rights of the Child' 4 <http://www.ohchr.org/Documents/Publications/LegislativeHistorycrc1en.pdf> (Date of use: 28 November 2016).

¹²³ OHCHR 'Legislative History' 4 [footnote 122].

¹²⁴ 1959 United Nations Declaration of the Rights of the Child 20 November 1959 A/RES/1386(XIV).

¹²⁵ First paragraph of the Preamble to the 1959 Declaration of the Rights of the Child [footnote 125].

¹²⁶ Third paragraph of the Preamble to the 1959 Declaration of the Rights of the Child [footnote 125].

children are physically and mentally immature and thus require special care, the Declaration focuses on the child itself, in comparison to an adult. By including a reference to the 1924 Geneva Declaration, the 1959 Declaration is informed by the events of the Second World War and the traumas experienced by both war-affected children and refugee children. Despite there being no explicit reference to refugee children, the 1959 Declaration is nevertheless built on the special needs and rights of the children who had experienced and been affected by war.

2.4 Articulating the *lex specialis* applying to the unaccompanied minor refugee

The child refugee, although also subject to the 1951 Convention and 1967 Protocol, has a separate international instrument in his corner: the CRC. It is appropriate to refer to McAdam's hierarchical classification which is that 'a child is foremost a child before he or she is a refugee, and protection needs must be assessed accordingly'.¹²⁷ According to Van Bueren, childhood is a distinct legal and social status precisely because of the perception of vulnerability, which requires special protection and assistance.¹²⁸ As discussed earlier, the unique protection needs of children, based on their particular vulnerability and immaturity, has been identified in Europe since the beginning of the 20th century. The evolution of the protection of children started with a very broad five-point declaration and has culminated in an internationally binding convention, setting out the detailed rights and duties of the child. To provide true international protection to refugee children, there must be a strong link between the rights in the CRC and international refugee law. This also means that children sit at the point where international refugee law, children's rights and national migration law meet. The tensions experienced in attempting to uphold the 1951 Refugee Convention and the political, social and economic pressures that come with refugee influxes, often result in children being victims of rights abuses, exploitation and trafficking.¹²⁹ The CRC is the

¹²⁷ McAdam J "Seeking Asylum under the Convention on the Rights of the Child: A Case for Complementary Protection" (2006) 14 *International Journal of Children's Rights* 269.

¹²⁸ Van Bueren G *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers Dordrecht The Netherlands 1995) 363.

¹²⁹ European Commission 'Report from the Commission to the European Parliament and the Council: Report on the progress made in the fight against trafficking in human beings (2016)' 8 <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking>

international instrument that requires states to provide special care and assistance to children.¹³⁰ When it concerns the extreme vulnerability of child refugees, there can be no doubt that the CRC should play a major role in state decisions, policies and cooperation because the protection obligation is not merely a charity or a discretionary gesture,¹³¹ but rather a requirement for finding durable solutions in the scattered framework of international refugee law.¹³²

2.5 Conclusion

Even though the 1951 Refugee Convention recognises the strong link between human rights law and providing protection to refugees, the protection provided depends on the applicant meeting various conditions. These conditions are not purely humanitarian and only extend to persons who are incompatible with their government and resulting in their persecution. Not only are refugees viewed as individuals who are incompatible with the government of their country but they are also processed in an individualistic manner before refugee status is granted. While the adult refugee has the right to seek and receive refugee status and protection according to the definition, he may not claim it as a matter of right.¹³³

The child refugee finds himself in similar position. It took a number of years before the rights of children became enforceable at law. Before then, children who were refugees, were considered refugees first and thus, subject to the definition of refugee at all stages of its evolution. Nowadays, a child is a child first, and the child that invariably suffered some form of persecution and trauma as well as being of a young age requires a legislative framework that demands this type of holistic protection.

[g/trafficking-in-human-beings/docs/commission_report_on_the_progress_made_in_the_fight_a
gainst_trafficking_in_human_beings_2016_en.pdf](https://www.unhcr.org/trafficking-in-human-beings/docs/commission_report_on_the_progress_made_in_the_fight_against_trafficking_in_human_beings_2016_en.pdf) (Date of use: 7 June 2016).

¹³⁰ Fourth paragraph in the Preamble to the CRC.

¹³¹ Islam and Bhuiyan in *Challenges and Options* 3 [footnote 15].

¹³² Kaime T 'The Normative Framework for Children's Rights in Refugee Situations' in Bhuiyan and Islam (ed) *An Introduction to International Refugee Law* (Martinus Nijhoff Publishers Leiden 2013) 402.

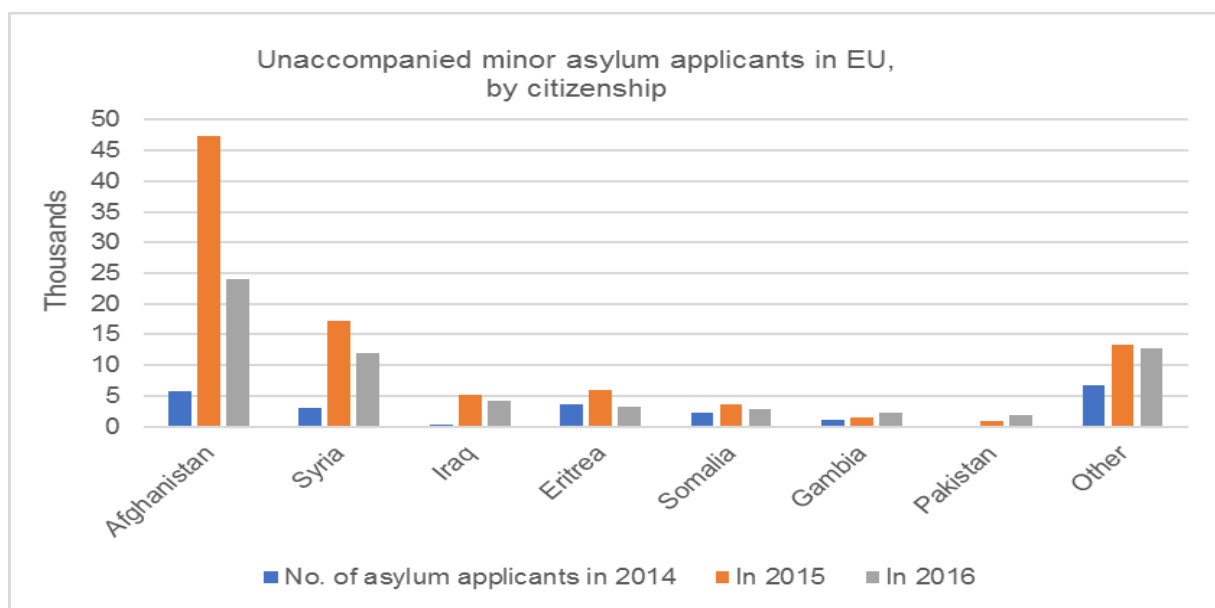
¹³³ Islam in *Origin and Evolution* 24 [footnote 36].

Chapter Three: The Role of the Convention on the Rights of the Child in International Law

3.1 Introduction

Principle 6 of the 1959 Declaration on the Rights of the Child is unequivocal: it states that ‘a child of tender years shall not, save in exceptional circumstances, be separated from his mother’.¹³⁴ Notwithstanding this, the phenomenon of unaccompanied minors independently fleeing persecution (often closely linked to conflict causing widespread humanitarian emergencies) in search of refuge is neither new, nor is it likely to abate in the near future, as is illustrated by the graph below.

*Graph 1*¹³⁵



From the previous chapter, it can be seen that the definition of refugee in the 1951 Refugee Convention is neither age specific nor does it contain any specific reference to child refugees.¹³⁶ There was some consideration therefore, whether the CRC should

¹³⁴ See footnote 124 for full reference.

¹³⁵ The source data for the graph can be found in Eurostat ‘Asylum applicants considered to be unaccompanied minors by citizenship, age and sex Annual data (rounded)’ <http://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database> (Date of use: 28 August 2017).

¹³⁶ Van Bueren *International Law* 360 [footnote 128].

be drafted in a manner that expands the definition of refugees in respect of children. States, however, showed no enthusiasm in this regard because it would mean a corresponding expansion in the principal refugee treaties.¹³⁷ This is not to say that the CRC does not provide important expansions in providing protection to refugee children, the discussion of which will be the focus of this chapter.

This chapter, therefore, examines the manner in which the CRC influences contemporary international refugee law to afford the refugee child the same rights as the national child in Europe. To this end, attention will be given to the three key ways the CRC influences international refugee law: general implementation obligations, the mandate to develop a children's rights perspective and the four guiding principles set out in the CRC. Consequently, the chapter will consider the effect of the CRC in the application of the European *acquis* to refugee children.

3.2 The general implementation obligations in the CRC

The legal machinery of international refugee law does not function in isolation when it concerns the refugee child. The CRC forms the core of the international law on the rights of the child.¹³⁸ As a body of binding rules between states, the CRC obliges states to establish and implement child protection systems.¹³⁹ Significantly, 192 of the 195 states in the world are signatories to the CRC and have voluntarily committed themselves to involvement in the review of refugee issues and to endorse applicable rules and standards.¹⁴⁰ In addition, the CRC is an international standard by which to measure performance.¹⁴¹ States, however, retain the exclusive competence relating to the implementation of protection systems and the protection of the human rights of those within their sovereign jurisdiction.¹⁴² In spite of the weakness and doubt caused

¹³⁷ Van Bueren *International Law* 361 [footnote 128].

¹³⁸ Kaime *Normative Framework* 404 [footnote 132].

¹³⁹ Article 4 of the CRC.

¹⁴⁰ 'Signatory States and Parties to the Convention on the Rights of the Child' <https://www.humanium.org/en/convention/signatory-states/> (Date of use: 13 January 2018).

¹⁴¹ Article 27 of the 1969 United Nations Vienna Convention on the Law of Treaties 23 May 1969 1155 UNTS 133; See also European Union Agency for Fundamental Rights (FRA) 'Handbook on the European law relating to the rights of the child' 27 http://www.echr.coe.int/Documents/Handbook_k_rights_child_ENG.PDF (Date of use: 24 April 2017).

¹⁴² Article 2(1) of the 1945 Charter of the United Nations 24 October 1945 1 UNTS XVI; Article 26 of the 1969 Vienna Convention on the Law of Treaties [footnote 141].

by this push-and-pull between humanitarian needs and the sovereign self-interest, what states do when they exercise their power for refugee children must be appraised in terms of international standards.

The Committee on the Rights of the Child is tasked to examine the progress of states parties' realisation of the obligations in the CRC.¹⁴³ The Committee is also competent to publish its own General Comments to, amongst others, help interpret, promote and protect children's rights. In its General Comment No. 5,¹⁴⁴ the Committee identifies several measures that are needed for the effective implementation of child protection systems, the so-called 'general measures of implementation'. These measures are contained in three distinct articles that outline states' obligations to develop the measures of implementing the CRC. Article 42 requires states to make the CRC known to adults and children; Article 44(6) obliges states to make their reports under the CRC widely available; lastly, Article 4, which is important for the purposes of this study, focuses on the implementation of the rights of the child.

Article 4 of the CRC, as the point of departure for general measures of implementation, provides that

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.

The wording in Article 4 is straightforward in requiring states to undertake all appropriate implementation measures but interestingly, suggests a distinction regarding the progressive realisation of economic, social and cultural rights. Although, what appears to be a distinction in the second sentence of Article 4, the Committee confirms that there is no simple or authoritative distinction of the CRC rights and that the enjoyment of civil and political rights is inextricably linked to that of economic, social

¹⁴³ Article 43 of the CRC.

¹⁴⁴ See footnote 58 for full reference.

and cultural rights.¹⁴⁵ The CRC not only covers virtually every right in a child's life, but it does so by promoting the indivisibility of a child's socio-economic rights and civil and political rights.¹⁴⁶ The indivisible nature of children's rights ensures that their physical, psychological, developmental and spiritual needs are met and thus, requires more than the provision of basic health and education.¹⁴⁷ Realistically though, states may not be able to meet their obligations under the CRC due to limitations in resources. The Committee, nevertheless, reiterates that a state party must demonstrate that there is implementation to the "maximum extent" of their resources.¹⁴⁸ If resources are inadequate, the state has a duty to seek international cooperation to ensure the widest possible enjoyment of the relevant rights¹⁴⁹ with a special focus on the most disadvantaged groups.¹⁵⁰

Sadly, there is evidence of EU member states adopting a hard stance to the entry and support of asylum seekers, which they rationalise on lack of resources.¹⁵¹ In 2016, Hungary placed serious restrictions on the amount of people who could enter the transit zones (only 15 people per zone per day) and there were reports of asylum seekers, including women and children, being beaten, threatened and exposed to humiliating practices while being pushed back across the Hungarian-Serbian border.¹⁵² It is difficult to sustain an argument of lack of resources; the annual average per capita income in European member states is just under US\$20 000,¹⁵³ far above that of most other

¹⁴⁵ Recital 6 of General Comment No. 5 [footnote 58].

¹⁴⁶ Kaime *Normative Framework* 403-404 [footnote 132].

¹⁴⁷ UNICEF 'The evolution of international standards on child rights' <https://www.unicef.org/rightsite/so-wc/pdfs/panels/SOWC%20all%20panels.pdf> (Date of use: 28 November 2016).

¹⁴⁸ Recital 7 of General Comment No. 5 [footnote 58].

¹⁴⁹ In this regard, the Committee are in complete agreement with the comments published by the UN Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' 1990 E/1991/23 <http://www.refworld.org/docid/4538838e10.html> (Date of use: 23 January 2017).

¹⁵⁰ Recital 8 of General Comment No. 5 [footnote 58].

¹⁵¹ European Parliament 'Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece' 34 [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU\(2017\)583132_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU(2017)583132_EN.pdf) (Date of use: 20 July 2017).

¹⁵² European Commission 'Compilation 2017' 57 and 130 [footnote 2].

¹⁵³ Eurostat 'Mean and Median Income by Age and Sex' http://ec.europa.eu/eurostat/data/database?node_code=ilc_di03 (Date of use: 31 August 2017).

states, particularly current refugee-producing states like Syria, Afghanistan and Iraq.¹⁵⁴ As a border member state, Hungary is often the point of first entry for countless asylum seekers and is, according to EU regulations, responsible for the care and protection of the asylum seekers.¹⁵⁵ During the negotiations of the September Decisions,¹⁵⁶ however, Hungary did not want to be included as a beneficiary country in the temporary emergency relocation scheme. The prime reason for their refusal was that Greece was failing to efficiently control their own borders and allowing asylum seekers to travel through to Hungary, thereby failing to act under the Dublin regulation as a frontline member state.¹⁵⁷ The speculation though, was that Hungary did not want to be an official registration and distribution center for thousands of asylum seekers, effectively becoming an 'EU refugee camp'.¹⁵⁸ As a result, the September Decisions no longer included Hungary as a beneficiary country but, as an EU member state, Hungary was included as a member state of relocation of asylum seekers from Italy and Greece and allocations were attributed.¹⁵⁹ In response, Hungary and the Slovak Republic brought an action in the European Court of Justice (the ECJ), in early December 2015, seeking to annul Council Decision (EU) 2015/1601 of 22 September 2015 on various grounds.¹⁶⁰ The court dismissed the action in its entirety on 6 September 2017.

Although in the above case there is no specific reference to the rights of children, it is interesting to note that there are numerous duties on border member states for the responsibility of protection and care of asylum seeking children. For instance, Hungary

¹⁵⁴ The last recorded GDP per capita (in 2010) in Syria was US\$1700.39, Afghanistan (in December 2016) is US\$596.30 and Iraq (in December 2016) is US\$5695.70 versus the last recorded GDP per capita in the Euro area (in December 2016) was US\$39 105.31. See Trading Economics <https://tradingeconomics.com/country-list/gdp-per-capita?continent=g20> (Date of use: 17 January 2018).

¹⁵⁵ See Mitchell J 'The Dublin Regulation and Systemic Flaws' 2017 *San Diego International Law Journal* 295-324 296; Van den Sanden T 'Case Law: Joined Cases C411/10, N.S. v. Sec'y of State for the Home Dep't' 2012 *Columbia Journal of European Law* 143-174 145-146.

¹⁵⁶ See footnotes 51 and 52 for the full reference.

¹⁵⁷ See Statement By Hungary in the Annex to the Draft Minutes of the 3411th meeting of the Council of the European Union (Justice and Home Affairs) held in Brussels on 22 September 2015 12295/15 6 <http://data.consilium.europa.eu/doc/document/ST-12295-2015-INIT/en/pdf> (Date of use: 17 January 2018).

¹⁵⁸ Robinson D 'Why Hungary wanted out of EU's refugee scheme' <https://www.ft.com/content/080fb765-5e93-35f7-9a3c-2e83b26c4b8c> (Date of use: 17 January 2017).

¹⁵⁹ Annex I and II to the 22 September Decision [footnote 52].

¹⁶⁰ *Slovak Republic and Hungary v Council of the European Union* 6 September 2017 Joined Cases C-643/15 and C-647/15 ECJ

is first, under a clear duty in Article 4 of the CRC to take appropriate legislative, administrative and other measures to implement the rights of children. This means that as an EU member state, the legislation adopted by the Council of the European Union,¹⁶¹ particularly legislation to aid in the responsibility of protecting vulnerable children, should be seriously considered as legislation falling within the purview of the obligation in Article 4 of the CRC. To this end, the Council of the European Union is specifically tasked with the protection and promotion of human rights¹⁶² and primarily relies on the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁶³ (ECHR). Article 3 of the ECHR prohibits torture, inhuman or degrading treatment or punishment. The European Court of Human Rights (ECtHR) confirmed¹⁶⁴ the absolute character of Article 3 in the case of *Khlaifia and Others v Italy*.¹⁶⁵ The court made it plain that even in light of the objective difficulties experienced during a migrant crisis, treatment without the intention of humiliating or degrading a victim may nonetheless be a violation of Article 3.¹⁶⁶ The actions of blocking people from entering the transit zone and beating and humiliating people, including children, by the governments of the Western Balkans therefore violates the prohibition on humiliating and degrading treatment in the ECHR. In addition, their refusal to become a beneficiary member state and implement measures that for all intents, aims to better protect the rights of asylum-seeking children, violates the general implementation obligation in the CRC.

¹⁶¹ Article 16(1) of the 2007 European Union Consolidated version of the Treaty on European Union 13 December 2007 2008/C 115/01 provides that '[t]he Council shall, jointly with the European Parliament, exercise legislative and budgetary functions.'

¹⁶² FRA 'Handbook' 23 [footnote 141]. A more in-depth discussion on the role of the Council can be found in section 3.5 of this paper.

¹⁶³ 1950 Council of Europe European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 4 November 1950 ETS 5. Also referred to as the European Convention on Human Rights (ECHR).

¹⁶⁴ The court specifically referred in paragraph 184, to previous case law including *MSS v Belgium and Greece* 21 January 2011 30696/09 ECtHR and *Hirsi Jamaa and Others v Italy* 23 February 2012 27765/09 ECtHR.

¹⁶⁵ Paragraph 184 in *Khlaifia and Others v Italy* 15 December 2016 16483/12 ECtHR.

¹⁶⁶ Paragraph 184 and 241 in *Khlaifia and Others v Italy* [footnote 165].

States parties not only undertake to implement the above general obligations – the Committee also requires the development of a children’s rights perspective¹⁶⁷ to achieve more effective implementation.¹⁶⁸ This means that states are to secure a ‘change in the perception of the child’s place in society, a willingness to give higher political priority to children and an increasing sensitivity to the impact of governance on children and their human rights.’¹⁶⁹ In order for this sort of development to occur, the Committee highlighted four articles in the CRC – four foundational principles – upon which states must rely.¹⁷⁰ Kaime lists the four principles as follows: ‘(1) the rule against discrimination, (2) the “best interests” rule, (3) the rule promoting the child’s survival and development, and (4) the rule requiring the child’s participation’.¹⁷¹ It can be said that there is a close tripartite relationship between these four principles, the general implementation obligations and the development of a children’s rights perspective. The development and effectiveness of each part of the relationship is not mutually exclusive, particularly when developing legal mechanisms that are specific to the refugee child. In this regard, the content and application of the four principles that are discussed below in the order provided by Kaime should be viewed as four integrated principles, independent and yet dependent upon one another for their effectiveness, that is to say, indivisible.

3.3 The four foundational principles

Before commencing with a discussion on the general principles, it is central to the discussion on the rights of the refugee child, to traverse Article 22(1) of the CRC which provides that:

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate

¹⁶⁷ UNICEF relies on a human rights-based approach to inform broad concepts such as childhood development, continued care and a protective environment, in ‘Evolution’ 5 [footnote 147].

¹⁶⁸ Paragraph 12 of General Comment No. 5 [footnote 58].

¹⁶⁹ Paragraph 10 of General Comment No. 5 [footnote 58].

¹⁷⁰ Paragraph 12 of General Comment No. 5 [footnote 58].

¹⁷¹ Kaime *Normative Framework* 406 [footnote 132].

protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

Although the CRC is not a refugee treaty, Article 22 specifies that refugee children are entitled to appropriate protection and humanitarian assistance while they enjoy the rights afforded to them in the CRC and other international instruments. This is an important expansion in the protection of children in that it guarantees all the rights in the CRC to child asylum seekers, rejected asylum seekers and refugees.¹⁷² As Van Bueren points out though, Article 22 cannot overcome the two fundamental weaknesses in international refugee protection and that is the outdated definition of refugee and the absence of a duty on states to provide asylum.¹⁷³

This article also coheres with Article 4 of the CRC, requiring special protection for children who are the most vulnerable in society. Read together, it means that despite European member states like Hungary experiencing pressure on resources as a result of the refugee crises, there is no justification for not ensuring the effective enjoyment of refugee children's rights.¹⁷⁴ Article 22 unequivocally ensures the importance of the rights of refugee children and that '[c]hildren's rights can no longer be perceived as an option, as a question of favour or kindness to children or as an expression of charity.'¹⁷⁵ Article 22, paragraph 2, further emphasises co-operation in protecting, assisting and tracing parents or family members of the refugee child, and providing the same protection to the refugee child as they would for any other child that has no family. In this way, the CRC focuses states parties' attention on the entitlements of unaccompanied children.¹⁷⁶ The 1951 Refugee Convention and the European regional protection instruments have their focus in a similar vein by recommending that governments take measures to protect the refugee's family and protect children who

¹⁷² Pobjoy *Child Rights Framework* 106-107 [footnote 118].

¹⁷³ Van Bueren *International Law* 362 [footnote 128].

¹⁷⁴ Paragraph 8 of General Comment No. 5 [footnote 58]; CESCR 'General Comment No. 3' [footnote 149]; Kaime *Normative Framework* 405 [footnote 132].

¹⁷⁵ UNICEF 'Frequently Asked Questions' https://www.unicef.org/crc/index_30229.html (Date of use: 13 March 2017).

¹⁷⁶ Paragraph 11 of General Comment No. 5 [footnote 58].

are unaccompanied.¹⁷⁷ Reuniting the family unit is a durable solution in the protection of the refugee child, as will be seen further in this thesis, and essential for the survival and development of the child. It cannot, however, be attained without the four cross-cutting principles which serve as a good point of departure for the analysis, not only of substantive provisions but also, the situation of children in different contexts.

The first general principle, the non-discrimination principle, as contained in Article 2(1) of the CRC, requires that:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

The above article applies to every child and is therefore an overarching principle that informs every single provision within the CRC. Significantly, this principle cannot function within a vacuum; it is a non-autonomous provision and can only be invoked together with a substantive provision.¹⁷⁸ On the one hand, the non-discrimination principle guarantees to every child in the state party's jurisdiction the rights in the CRC, irrespective of their migration status or cultural or political background. In their General Comment No. 6, the Committee definitively includes children attempting to enter a country's territory as children who come under that state's jurisdiction.¹⁷⁹ State parties therefore bear an obligation that is negative in nature, where their actions should not hinder the enjoyment of the child's rights in the CRC.¹⁸⁰ On the other hand, and keeping Article 22(1) in mind, the principle of non-discrimination actually requires states to

¹⁷⁷ Recommendation B of the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons 28 July 1951 A/CONF.2/108/Rev.1 <http://www.refworld.org/docid/40a8a7394.html> (Date of use: 25 January 2017).

¹⁷⁸ Kaime *Normative Framework* 408 [footnote 132].

¹⁷⁹ Paragraph 12 of UN Committee on the Rights of the Child 'General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin' 1 September 2005 CRC/GC/2005/6 <http://www.refworld.org/docid/42dd174b4.html> (Date of use: 13 June 2017).

¹⁸⁰ Senovilla Hernández D and La Grange P 'The Legal Status of Unaccompanied Children Within International, European and National Frameworks: Protective Standards vs. Restrictive Implementation' 7 <http://lastradainternational.org/lisdocs/legal%20status%20of%20unaccompanied%20children.pdf> (Date of use: 30 January 2018).

actively take steps to ensure that refugee children can enjoy the same rights in the CRC as well as other international human rights instruments.¹⁸¹ This entails an obligation that is positive in nature,¹⁸² where states parties are obliged to actively identify individuals and groups of children where special measures are necessary to address discrimination or potential discrimination.¹⁸³ To identify discrimination is to understand that it is:

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.¹⁸⁴

The UN Human Rights Committee¹⁸⁵ points out that the principle of equality works together with the non-discrimination principle to ensure that temporary, preferential treatment of a part of the population in specific situations is undertaken for the purpose of correcting inequality and discrimination.¹⁸⁶ In reception centres, for example, measures should be in place to differentiate protection needs such as those deriving from age and gender, thus, children are placed in separate accommodation to adults¹⁸⁷ or young girls and boys are accommodated separately.¹⁸⁸ The Committee, however, interprets the non-discrimination principle to mean that measures relating to public

¹⁸¹ Paragraph 18 of General Comment No.6 [footnote 179]; Kaime *Normative Framework* 409 [footnote 132].

¹⁸² Senovilla Hernández and LaGrange 'Legal Status of Unaccompanied Children' 8 [footnote 180].

¹⁸³ Paragraph 12 of General Comment No. 5 [footnote 58].

¹⁸⁴ Paragraph 7 of the UN Human Rights Committee 'General comment No. 18 (1989): Non-discrimination' 10 November 1989 http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSeArch.aspx?Lang=en&TreatyID=8&DocTypeID=11 (Date of use: 25 January 2018).

¹⁸⁵ UN Human Rights Committee <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> (Date of use: 25 January 2018).

¹⁸⁶ Paragraph 10 of General Comment No. 18 [footnote 184].

¹⁸⁷ See in this regard, the discussion in European Union Agency for Fundamental Rights (FRA) 'Current Migration Situation in the EU: Separated Children' 5-6 <http://fra.europa.eu/en/publication/2016/december-monthly-migration-focus-separated-children> (Date of use: 24 April 2017).

¹⁸⁸ According to the guide for unaccompanied children in Belgium, all unaccompanied or separated children are placed in an Observation and Orientation Centre where the Guardianship Service can identify children with specific needs and transfer them to more specialised reception centres. For example, young children, children with psychological problems, pregnant children or those particularly at risk of trafficking. European Migration Network 'Unaccompanied minors in Belgium' 6 <http://www.refworld.org/docid/545ca8fe4.html> (Date of use: 26 January 2018).

order “can never be applied on a group or collective basis.”¹⁸⁹ The overarching nature of the non-discrimination principle permeates the case law related to asylum-seeking children.¹⁹⁰ In *Popov v France*¹⁹¹ the court specifically pointed out that regardless of the child’s refugee status or his being accompanied by his or her parents or not, the state must ensure that he or she enjoys protection and humanitarian assistance.¹⁹² Looking specifically at the European aspect, Article 14 is the corresponding non-discrimination article in the European Convention on Human Rights.¹⁹³ In a recent decision in *In the Matter of M (Children)*,¹⁹⁴ the court considered that Article 14 of the ECHR, and by extension Article 2 of the CRC, does not provide an exhaustive list on which discrimination is prohibited.¹⁹⁵ The text in Article 14 ECHR prohibits discrimination on “any grounds such as...” and the text in Article 2(1) CRC prohibits discrimination “of any kind...”. Both articles end the list with the generic “or other status.” The wording of both texts thus allows discriminatory measures to be assessed even if it is not an express ground listed. Nevertheless, discrimination in a certain context may not be properly identified without the corresponding exercise of the following principles: the best interests principle and the participation by children.

The second, and one of the most important principles that applies to the rights of the child is found in Article 3(1) of the CRC, the ‘best interests’ principle. This principle entails that:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

¹⁸⁹ Paragraph 18 of General Comment No. 6 [footnote 179].

¹⁹⁰ See for instance the list of cases generated by the Child Rights International Network (CRIN) ‘Article 2: Non-Discrimination’ <https://www.crin.org/en/crc/article-2-non-discrimination> (Date of use: 30 January 2018).

¹⁹¹ *Popov v France* 19 January 2012 39472/07 and 39474/07 ECtHR.

¹⁹² Paragraph 91 in *Popov v France* [footnote 191].

¹⁹³ “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

¹⁹⁴ *In the Matter of M (Children)* 20 December 2017 [2017] EWCA Civ 2164.

¹⁹⁵ Paragraph 102(iii) of *In the Matter of M (Children)* [footnote 194].

Like non-discrimination, the best interests principle functions as an overarching principle, informing all actions concerning children and every single right and freedom in the CRC.¹⁹⁶ Unlike the non-discrimination principle, it can function as an autonomous principle.¹⁹⁷ Also known as the welfare principle,¹⁹⁸ it informs all actions that directly affect, relate to, refer to or even have an indirect consequence or impact on the rights of children.¹⁹⁹ As part of considering a child's best interests, the state parties must undertake the necessary protection and care to ensure the child's overall well-being.²⁰⁰ The Committee underscores the broad nature of the terms "protection and care" in their General Comment No. 14 by pointing out that they are not couched in limited or negative terms.²⁰¹ Instead, the terms are to be understood in relation to a child's "basic material, physical, educational, and emotional needs, as well as needs for affection and safety."²⁰² It should be kept in mind, however, that the best interests approach reshapes children as rights-holders and not merely humans requiring protection and help in the traditional welfare sense.²⁰³

The application of this particular principle is vital, first, in governmental policy-making and second, when decisions are made with regard to an individual child.²⁰⁴ In the course of policy-making, like the drafting and enactment of the temporary European relocation scheme, the best interests principle requires governments to analyse and identify the various interests of children at stake.²⁰⁵ The broad nature of the word "interests" certainly indicates more than "rights".²⁰⁶ In relation to asylum-seeking children, each child will find themselves in a specific situation of vulnerability and it is

¹⁹⁶ Paragraph 1 of the UN Committee on the Rights of the Child 'General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration' 29 May 2013 CRC/C/GC/14 <http://www.refworld.org/docid/51a84b5e4.html> (Date of use: 14 June 2017); Kaime *Normative Framework* 410 [footnote 117].

¹⁹⁷ Paragraph 6(a) of General Comment No. 14 [footnote 196].

¹⁹⁸ Kaime *Normative Framework* 409 [footnote 132].

¹⁹⁹ Kaime *Normative Framework* 410 [footnote 132].

²⁰⁰ Article 3(2) of the CRC.

²⁰¹ The example given of limiting the terms is for instance "to protect the child from harm." See Paragraph 71 of General Comment No. 14 [footnote 196].

²⁰² See Paragraph 71 of General Comment No. 14 [footnote 196].

²⁰³ Stern R *The Child's Right to Participation – Reality or Rhetoric?* (LLD thesis Uppsala University 2006) 39.

²⁰⁴ Van Bueren G *International Documents on Children* 2nd ed (Martinus Nijhoff The Hague 1998) 451.

²⁰⁵ Paragraph 6(c) of General Comment No. 14 [footnote 196].

²⁰⁶ Stern *Right to Participation* 39 [footnote 203].

the obligation of the authorities to take account of the degrees of vulnerability of each child.²⁰⁷ To assist states in ensuring that the best interest of children is a primary consideration, the Committee requires the implementation of a continuous process of child rights impact assessment, known as CRIA.²⁰⁸ The intention of the CRIA is to predict the impact of the proposed legislation, policy or budgetary decisions on children and the enjoyment of their rights.²⁰⁹ This assessment must also have a special regard for the type of impact the measures might have on different children.²¹⁰ To this end, the CRIA calls for input from various sources like children themselves, general society, research and/or relevant governmental departments.²¹¹

As regards the decision-making process for an individual child, like the decision on a durable solution, the best interests principle must at least be the primary consideration.²¹² Indeed, the court in Strasbourg confirmed in *Rahimi v Greece*²¹³ that Article 3 of the CRC “sets out that the best interests of the child shall be a primary consideration of, among others, administrative authorities in *all* decisions concerning the child”²¹⁴ (own emphasis). As will be discussed in Chapter 4 of this paper and specifically in relation to durable solutions, the Committee introduced a broad guide when assessing and determining the best interests of the child for a future decision.²¹⁵ It is a two step guide requiring first assessment, wherein information on the child’s identity, vulnerability and protection needs is accumulated and assessed.²¹⁶ Second, in light of the assessment and a balancing of the various interests of the child, the authorities are in a position to make a best interests determination.²¹⁷ To further ensure the best interests of the unaccompanied child, a legal guardian must be appointed to

²⁰⁷ Paragraph 76 of General Comment No. 14 [footnote 196].

²⁰⁸ Paragraph 35 of General Comment No. 14 [footnote 196].

²⁰⁹ Paragraph 35 of General Comment No. 14 [footnote 196].

²¹⁰ Paragraph 99 of General Comment No. 14 [footnote 196].

²¹¹ Paragraph 99 of General Comment No. 14 [footnote 196].

²¹² Van Bueren *International Documents* 451 [footnote 204].

²¹³ *Rahimi v Greece* 5 April 2011 8687/08 ECtHR.

²¹⁴ Paragraph 108 of CRIN ‘Rahimi v Greece: Case Summary as translated to English’ <https://www.crin.org/en/library/legal-database/rahimi-v-greece> (Date of use: 30 January 2018).

²¹⁵ Paragraph 46 of General Comment No. 14 [footnote 196].

²¹⁶ Paragraph 20 of General Comment No. 6 [footnote 179].

²¹⁷ Paragraph 19 and 20 of General Comment No. 6 [footnote 179].

represent the child in all administrative and legal matters.²¹⁸ One of the aspects the Committee covered in their General Comment No. 14 relates to procedural safeguards to guarantee the implementation of the child's best interests; that aspect is time.²¹⁹ The Committee advises that decision-making procedures or processes be completed in the shortest time possible. This will prevent the particularly adverse effects on children caused by prolonged decision-making.²²⁰ Although the Committee does not mention the amount of time that is reasonable for a decision in the best interests of the child, the matter was traversed by the court in *A. B. and Others v France*.²²¹ The child in this case was accompanied by his parents who unsuccessfully applied for asylum. As a result of an arrest for theft by a member of the family, the family were placed in an administrative detention centre pending further decisions on their expulsion from France. The child was four years old at the time and held in the detention centre with his parents for a total of 18 days. The court held that there was a violation of Article 3 of ECHR, the prohibition of torture or inhuman or degrading treatment or punishment, in respect of the child.²²² The child's exposure to an atmosphere that was considered coercive and a source of anxiety and distress was not of itself a violation of Article 3.²²³ The deciding factor was the amount of time that the child spent in the detention centre pending the decision regarding expulsion.²²⁴

The weakness of the best interests principle lies in the fact that there is no closed list of factors to use in consideration of the best interests of the refugee child. European member states express concern that there is a gap between the theory and the practical application and the feeling that there is too little standardisation of what it means in practice.²²⁵ No doubt, this aggravates the processing time of each refugee child, when there is little guidance to such an expansive concept. Kaime, however, argues that this

²¹⁸ Paragraph 21 of General Comment No.6 [footnote 179].

²¹⁹ See Chapter V Section B of General Comment No. 14 [footnote 196].

²²⁰ Paragraph 93 of General Comment No. 14 [footnote 196].

²²¹ *A. B. and Others v France* 12 July 2016 11593/12 ECtHR.

²²² Paragraph 115 of *A. B. and Others v France* [footnote 221].

²²³ Paragraph 114 of *A. B. and Others v France* [footnote 221].

²²⁴ Paragraph 115 of *A. B. and Others v France* [footnote 221].

²²⁵ House of Lords European Union Committee 'Children in Crisis: Unaccompanied Migrant Children in the EU 2nd Report of Session 2016-17' 31-33 <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/34/34.pdf>

inherent flexibility is actually not a weakness but rather a strength, because it allows contextual application both in policy- and decision-making.²²⁶ A thorough, contextual consideration of the best interests principle not only fosters a child right's perspective but also promotes the indivisibility of children's rights.²²⁷ In the uncertain and tumultuous life of a refugee child, the best interests principle must facilitate the normalisation of the situation as quickly as possible, to support the full development of the 'whole' child;²²⁸ that is to say, to secure the holistic integrity of the child and promote their human dignity.²²⁹

The third principle listed is the survival and development principle, contained in Article 6 of the CRC, which states that:

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Despite the third principle being listed as 'survival and development', the Committee also adopted the right to life as a general principle.²³⁰ The right to life and the right to survival and development are inextricably linked.²³¹ Both are essential preconditions to the enjoyment of other rights contained in the CRC.²³² In other words, it seems obvious that the child must live, survive and develop in order to enjoy rights such as education, leisure, play and culture.²³³ Van Bueren explains that reciprocally, thus in a mutually-

²²⁶ Kaime *Normative Framework* 411 [footnote 132].

²²⁷ Paragraph 16(a) of General Comment No. 14 [footnote 196]; Senovilla Hernández and LaGrange 'Legal Status of Unaccompanied Children' 9 [footnote 180].

²²⁸ Kaime *Normative Framework* 412 [footnote 132]; Goodwin-Gill 1995 *IJCR* 407 [footnote 16].

²²⁹ Paragraph 5 of General Comment No. 14 [footnote 196].

²³⁰ Paragraph 12 of General Comment No. 5 [footnote 58].

²³¹ Hodgson D 'The child's right to life, survival and development' 1994 *The International Journal of Children's Rights* 383.

²³² Kaime *Normative Framework* 413 [footnote 132]; Van Bueren *International Documents* 293 [footnote 204].

²³³ Menghistu F 'The Satisfaction of Survival Requirements' in Ramcharan B (ed) *The Right to Life in International Law* (Martinus Nijhoff Dordrecht 1985) 63, where Menghistu opens his contributing chapter by stating that '[t]he right to life is the most basic, the most fundamental, the most primordial and supreme right which human beings are entitled to have and without which the protection of all other rights becomes either meaningless or less effective.'

reinforcing fashion, the three general principles of non-discrimination, best interests and participation, work to achieve the survival and development of the child.²³⁴

The understanding of the concepts of survival and development are fairly distinct, yet both are dynamic in nature, incorporating a holistic approach to cater to all dimensions of the child.²³⁵ The right to survival, on the one hand, as a term of art in children's rights matters, is essential to ensure a life of human dignity by facilitating the improvement of the child's standard of living.²³⁶ International organisations such as UNICEF identify children's survival by the provision of essential services like immunisation, nutrition, maternal-, newborn- and child health care, quality education, water, sanitation and hygiene.²³⁷ As a legal term, survival encompasses the absolutely essential steps necessary to keep a child alive and thereafter, to reach the objective of the healthy development of the child.²³⁸ Development, as a distinct term contained within the UN Declaration on the Right to Development,²³⁹ is identified as

an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.²⁴⁰

Children, specifically, are entitled just as adults are, to be active participants and beneficiaries in developmental policies and programmes.²⁴¹ Simply, development is aimed at the 'constant improvement of the well-being of ... all individuals',²⁴² that is to

²³⁴ Van Bueren *International Documents* 451 [footnote 204].

²³⁵ Kaime *Normative Framework* 414 and 415 [footnote 132].

²³⁶ Menghistu *Survival Requirements* 81 [footnote 233]; Hodgson 1994 *IJCR* 384 [footnote 231].

²³⁷ UNICEF 'What we do – Child Survival' <https://www.unicef.org/what-we-do#child-survival> (Date of use: 24 March 2017).

²³⁸ Hodgson 1994 *IJCR* 384 [footnote 231].

²³⁹ 1986 United Nations Declaration on the Right to Development 4 December 1986 A/RES/41/128.

²⁴⁰ Article 1(1) of the Declaration on the Right to Development [footnote 239].

²⁴¹ Article 2(1) of the Declaration on the Right to Development [footnote 239]; OHCHR 'Fact Sheet No. 37: Frequently Asked Questions on the Right to Development' http://www.ohchr.org/Document/s/Publications/FSheet37_RtD_EN.pdf (Date of use: 27 March 2017).

²⁴² Article 2(3) of the Declaration on the Right to Development [footnote 239].

say, state parties must ensure that the child is able to develop his talents and abilities,²⁴³ responsibilities and solidarity toward his fellow man.²⁴⁴

The drafters of the CRC knew that the construction of Article 6 would augment the understanding of the interrelatedness of the right to life, survival and development and it is not surprising that they appear in that order.²⁴⁵ Essentially, the right to life is protected through the satisfaction of survival requirements²⁴⁶ and in turn, the achievement of childhood development is promoted by guaranteeing the right to life and survival. Senovilla Hernández and La Grange explain that the three concepts are absolutely necessary in deciding which durable solution should be followed.²⁴⁷ The decision regarding an unaccompanied child is not only whether the child should be returned to his or her country of origin or integrate in the country of destination, it is also whether the child has opportunity to reach adequate and maximum survival and development in those countries.²⁴⁸ The Committee, however, couches the right to life, survival and development in the negative by explaining that the obligation is to protect children from violence and exploitation that could jeopardise their rights in Article 6.²⁴⁹ The obligation therefore requires states to take measures to avoid or minimise the risks of violence, exploitation, trafficking and/or involvement in criminal activities.²⁵⁰ The durable solution thus entails a positive search for opportunities to enjoy the rights in Article 6 and the Committee invites states to prevent these rights from being jeopardised. To complicate the matter, each country involved in the risky migration undertaken by unaccompanied children hold the responsibilities to ensure the rights in Article 6 of the CRC; the country of origin, the country of transit and the country of destination. The question of which country incurs the eventual responsibility under Article 6 is a delicate issue and remains unclear.²⁵¹

²⁴³ Article 29(a) of the CRC.

²⁴⁴ Article 29(d) of the CRC.

²⁴⁵ Hodgson 1994 *IJCR*384 [footnote 231].

²⁴⁶ Menghistu *Survival Requirements* 67 [footnote 233].

²⁴⁷ Senovilla Hernández and La Grange 'Legal Status of Unaccompanied Children' 10 [footnote 180].

²⁴⁸ Senovilla Hernández and La Grange 'Legal Status of Unaccompanied Children' 10 [footnote 180].

²⁴⁹ Paragraph 23 of General Comment No. 6 [footnote 179].

²⁵⁰ Paragraph 24 of General Comment No. 6 [footnote 179].

²⁵¹ Senovilla Hernández and La Grange 'Legal Status of Unaccompanied Children' 10 [footnote 180].

The fourth and final guiding principle is the principle that requires the participation of the child in matters that affect him or her. The chief article underlining the participation principle is Article 12(1):

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Article 12 functions in a similar way to the best interests principle. The right to participation is autonomous, a right in itself.²⁵² It is also an article that is overarching in nature, used when interpreting and implementing all other rights in the CRC.²⁵³ Article 12 quickly establishes that the child is an individual, acting autonomously and having his own views and opinions, thereby honouring the precept that children are active subjects of the rights in the CRC, exercising their own agency.²⁵⁴ The Committee confirms that Article 12 accords a child the right to influence his own life, which is not dependent on his vulnerability or his dependency on adults.²⁵⁵ The right to participation itself marks two demands: the child's active participation in all matters that affect him, and that he is meaningfully involved in the process.²⁵⁶ First, in order for the child to actively participate, there needs to be a process of dialogue and exchange between children and adults.²⁵⁷ Children must speak 'freely' by expressing their own views without being pressured, influenced or constrained in any manner.²⁵⁸ However, adults do not have to fulfil every desire the child expresses, rather that they give due weight to their views in accordance with the age and maturity of the child.²⁵⁹ There is a distinction between vulnerability and maturity: age and maturity are indicators of an 'evolving

²⁵² Paragraph 2 of UN Committee on the Rights of the Child 'General comment No. 12 (2009): The right of the child to be heard' 20 July 2009 CRC/C/GC/12 <http://www.refworld.org/docid/4ae562c52.html> 8 (Date of use: 25 May 2016).

²⁵³ Paragraph 2 of General Comment No. 12 [footnote 252].

²⁵⁴ Kaime *Normative Framework* 416 [footnote 132].

²⁵⁵ Paragraph 18 of General Comment No. 12 [footnote 252].

²⁵⁶ UNICEF 'Fact Sheet: The Right to Participation' https://www.unicef.org/crc/index_30228.html (Date of use: 20 March 2017) 1, 3.

²⁵⁷ UNICEF 'Participation' 1 [footnote 256].

²⁵⁸ Paragraphs 133-134 of General Comment No. 12 [footnote 252] where the Committee itemises the basic requirements for effective, ethical and meaningful implementation of the right to participation.

²⁵⁹ Paragraph 12 of General Comment No. 5 [footnote 58]; Paragraph 13 of General Comment No. 12 [footnote 252].

capacity'²⁶⁰ of a child's decision-making ability. Adults have a corresponding evolving capacity in this exchange which requires their willingness to listen and learn, to understand and consider, to re-examine their own opinions and attitudes, and to create solutions.²⁶¹

Second, meaningful involvement of the child in decisions and actions that affect him requires that the child also understands the consequences and the impact of their views and opinions.²⁶² Likewise, it calls for a level of follow-up and evaluation pursuant to the submission of recommendations and concerns by children.²⁶³ Indeed, it is shown that development and cooperation is more valuable when the intended end users are involved at all levels of planning, implementation and evaluation.²⁶⁴ The type of questions asked should be based on the four guiding principles: is this in the best interests of the child; is there any form of discrimination; will this contribute to the survival and further development of the child; and are all children, especially the most disadvantaged, able to participate in a meaningful way.

The right to participation is considered an important coordinating element, particularly, one that holds the various elements of the complicated structure of the CRC together.²⁶⁵ As one of the four fundamental guiding principles, it acts as an underlying value demanding a broad interpretation for optimal use in the best interests of the child.²⁶⁶ Participation is also a right on its own and requires commitment and clear actions to become a reality.²⁶⁷ Additionally, the participation principle is used as an assessment criterion when there is implementation of other children's rights. In fact, the phrase 'all matters affecting the child' is to be understood broadly, with the result that nearly every

²⁶⁰ Article 5 of the CRC.

²⁶¹ UNICEF 'Participation' 2 [footnote 256].

²⁶² UNICEF 'Participation' 3 [footnote 256].

²⁶³ UNICEF 'Participation' 3 [footnote 256].

²⁶⁴ UNICEF 'Evolution' 5 [footnote 147].

²⁶⁵ Kaime describes the right to participation as the "lynchpin in the scheme set up by the CRC" in *Normative Framework* 419 [footnote 132].

²⁶⁶ Paragraph 70 of General Comment No. 12 [footnote 252].

²⁶⁷ In her thesis, Stern R analyses the gap between the right of participation as contained in the CRC and the challenges states parties face in attempting to implement the right in a meaningful way. See Stern *Right to Participation* [footnote 203].

article in the CRC relates to children's participation in society.²⁶⁸ The phrase also implies ongoing and consistent application of the right to participation at all ages and maturity of the child, it is not, as the Committee says, a "one-off event."²⁶⁹ This not only enriches the decision-making processes and outcomes by sharing perspectives, but also increases the responsibilities of the child, contributing to active, tolerant, participatory and democratic adults.²⁷⁰ Stern fairly considers the right to participation as a means of deepening democracy and thereby contributing to peace and security in the world.²⁷¹ Finally, yet critical to the refugee child, the Committee in General Comment No. 5 states that 'all matters affecting the child' demands state parties to ascertain the views of particular groups of children when dealing with particular issues.²⁷² This means that states parties must hear the input of unaccompanied refugee children in the reform of the Dublin III Regulation by the EU, particularly the emergency relocation scheme where child refugees are relocated to another member state as a durable solution. The question then is, whether the EU did in fact uphold the right to participation of refugee children, who are the most disadvantaged group; how this was conducted and thereafter; whether due weight was given to the children's perspectives or if there was a rush to find solutions, fundamentally compromising children's effective participation.²⁷³ These questions are particularly poignant given that the operation of the temporary European relocation scheme may extend beyond the initial two years.²⁷⁴

3.4 The CRC and the refugee child

The CRC is the international treaty to ensure that all member states implement and respect the rights of the child.²⁷⁵ The structure created by the drafters safeguards the primacy of the general implementation obligations and the four fundamental guiding

²⁶⁸ Paragraph 26 of General Comment No. 12 [footnote 252]; Kaime *Normative Framework* 418 [footnote 132].

²⁶⁹ Paragraph 12 of General Comment No. 5 [footnote 58]; Paragraph 133 of General Comment No. 12 [footnote 252].

²⁷⁰ Paragraph 125 of General Comment No. 12 [footnote 252].

²⁷¹ Stern *Right to Participation* 15 [footnote 203]; UNICEF 'Participation' 1 [footnote 256].

²⁷² Paragraph 12 of General Comment No. 5 [footnote 58].

²⁷³ Goodwin-Gill believes that the pressure and 'rush to solutions' often results in premature decisions as durable solutions without a more considered, contextual approach in Goodwin-Gill 1995 *IJCR* 410 [footnote 16].

²⁷⁴ Article 13 of the 14 September Decision 155-156 [footnote 51].

²⁷⁵ Article 27 of the 1969 Vienna Convention on the Law of Treaties [footnote 141].

principles, by placing these provisions at the beginning of the CRC.²⁷⁶ The structure also lends itself to the creation of a tripartite relationship between the four guiding principles, the general implementation obligations and the development of a child's rights perspective.²⁷⁷ It is the author's observations that the first part of the relationship, between the general implementation obligations and the four guiding principles, ensures the actual implementation of the four principles in all matters concerning the child. Reciprocally, the four principles guide the way when implementing other rights in the CRC. The second part of the relationship reveals that the four principles inform the development towards a child's rights perspective at all levels of government. In a mutually supporting fashion, the development of a child's rights perspective upholds the four guiding principles in government policies and programmes. In the third part of the relationship, the general implementation obligations drive a child rights perspective through implementation. Reciprocally, the child rights perspective informs the implementation obligations by retaining the necessary sensitivity during interactions with, and actions on behalf of, children. This integrated approach is especially important to protect and assist the doubly vulnerable refugee child.

The CRC, in providing rights for children during emergency times such as the refugee crisis, sets out a wide and integrated understanding of all matters that affect children and helps to include children in the development of protection processes in a meaningful way.²⁷⁸ The ultimate goal in identifying the four key principles informing children's rights is to guarantee a life of human dignity by improving the lives and living conditions of children.²⁷⁹ It is particularly important with regard to refugee children to strive towards finding durable solutions in the child's world of chaos, to find a permanent solution enabling them to build their future.²⁸⁰ The CRC accepts a broad, holistic

²⁷⁶ See paragraph 1(a) of OHCHR 'Legislative History' 329 [footnote 122] where the suggestion is made to have the non-discrimination principle immediately after Article 1, the definition of a child. The reason was that the 1959 Declaration of the Rights of the Child had, as its first principle, that rights should be recognised for all children without exception.

²⁷⁷ See paragraph B of OHCHR 'Legislative History' 349 [footnote 122]. In the first Polish draft convention, there was no article equivalent to the implementation article, Article 4 of the CRC. The comments made by Colombia, Cyprus and Norway addressed this concern calling for implementation and steps to be taken by states parties.

²⁷⁸ Paragraph 27 of General Comment No. 12 [footnote 252].

²⁷⁹ *Stern Right to Participation* 38 [footnote 203].

²⁸⁰ Goodwin-Gill 1995 *IJCR* 407 [footnote 16].

understanding of the wishes of a child when he arrives in a state seeking protection and will assist in determining the durable solutions for that individual child.²⁸¹ During a time of crisis, these obligations must continue to be upheld in order to truly respect the four general principles underpinning the CRC and thereby determine true, durable solutions for refugee children.²⁸² Be that as it may, a crisis situation may lead to temporary processes being implemented, such as the temporary relocation scheme, but these decisions do not allow the negation of the strict obligations contained in the CRC. It is therefore necessary to determine whether the Dublin III Regulation and the temporary relocation scheme respect and implement the obligations in the CRC and also, whether the temporary processes work toward a fast-acting, durable solution for the refugee child.

3.5 The application of the European *acquis* to refugee children

The EU, as an economic and political union, cannot be a party to the CRC because only states may ratify an international instrument.²⁸³ However, since all member states of the EU are parties to the CRC, they share common international legal obligations relating to the child. The result is that the CRC is the cornerstone in the development and application of children's rights in European institutions.²⁸⁴

There are currently several instruments applicable in Europe²⁸⁵ with regard to the rights of the child: the two central instruments are the European Convention on Human Rights (ECHR)²⁸⁶ and the Charter of Fundamental Rights of the European Union (the Charter).²⁸⁷ Briefly, the Charter is legally binding²⁸⁸ and applies when a member state implements EU law such as EU regulations, decisions or directives. In other words, the

²⁸¹ Goodwin-Gill 1995 *IJCR* 406 [footnote 16].

²⁸² Paragraph 125-126 of General Comment No. 12 [footnote 252].

²⁸³ Article 2(g) and 6 of the 1969 Vienna Convention on the Law of Treaties [footnote 141].

²⁸⁴ FRA 'Handbook' 26-27 [footnote 141].

²⁸⁵ This dissertation will not traverse the intricacies of what makes up the European Union and the Council of Europe. For our purposes, the focus will remain on the rights of the child and the instruments that may be relied upon by the refugee child.

²⁸⁶ See footnote 163 for the full reference.

²⁸⁷ See footnote 11 for the full reference.

²⁸⁸ The Charter became legally binding on 1 December 2009 with the adoption of the Treaty of Lisbon; 2007 European Union Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community 13 December 2007 2007/C 306/01.

Charter, as primary EU law, is used in the consideration of secondary EU legislation and national measures.²⁸⁹ The ECHR on the other hand, functions as a human rights instrument for all people in states that belong to the Council of Europe. The EU is made up of 28 states whereas the Council of Europe is made up of 47 states including Russia, Ukraine, Norway, the UK etc. The ECHR, like many of the rights-based legislative instruments, was drafted in response to the tragedies of the Second World War with the aim of protecting the most basic human rights and prohibiting unfair and harmful practices.²⁹⁰ Despite there being no specific mention or definition of a child in the ECHR, member states are obliged to ensure to 'everyone within their jurisdiction the rights and freedoms'²⁹¹ within the instrument and further, that these shall be enjoyed 'without discrimination on any ground,'²⁹² including grounds of age.

The EU Agency for Fundamental Rights (best known as FRA) together with the Council of Europe, in 2015, published the Handbook on European law relating to the rights of the child,²⁹³ that sets out both the EU law and the Council of Europe law relating to areas specific to children. The purpose of the handbook is to publish information on the role of European law in securing the enjoyment of the universal rights of children, including the rights of children in migration and asylum.²⁹⁴ Therefore, in the focus on the system of asylum and refugeehood, it is thus important to consider that under Article 67 of the Treaty on the Functioning of the EU (TFEU),²⁹⁵ the EU has clear competence to legislate on and frame a common policy on asylum, immigration and external border controls. The negotiation, development and drafting of the directives and regulations making up the Common European Asylum System, provides common minimum standards for the treatment of all asylum seekers and applications. In addition to the CEAS aiming to provide access to a fair and efficient international protection for refugees, the international community recognises that child refugees are the most

²⁸⁹ Article 6(1) of the Treaty on European Union [footnote 161] provides that '[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union ..., which shall have the same legal value as the Treaties.'

²⁹⁰ First and fourth paragraph of the Preamble to the ECHR [footnote 163].

²⁹¹ Article 1 of the ECHR [footnote 163].

²⁹² Article 14 of the ECHR [footnote 163].

²⁹³ FRA 'Handbook' [footnote 141].

²⁹⁴ See the Foreword by Samardžić-Marković S and Manolopoulos C in FRA 'Handbook' 3 [footnote 141].

²⁹⁵ See footnote 19 for full reference.

vulnerable and require a more specific, higher level of care. There was an Action Plan for Unaccompanied Minors (2010-2014),²⁹⁶ whereby the European Commission proposed an EU approach to *inter alia* prevent unsafe migration and trafficking;²⁹⁷ set out reception and procedural guarantees in the EU;²⁹⁸ and achieve identification of durable solutions.²⁹⁹ Despite the need for further measures, scholars stress that the frameworks protecting children's rights are not being implemented consistently by member states.³⁰⁰

3.6 Conclusion

As one of the most universally ratified treaties in the world, the CRC is the blueprint for the holistic and fair treatment of all children. Its structure, content and intention creates a document that impresses upon the indivisibility of all rights of the child.³⁰¹ The clarifying comments published by the Committee ensures that states parties perceive the importance in implementing measures that venerate the rights of the child. Upholding the rights of the unaccompanied child and stepping in to the role of protector and nurturer, is one of the most significant duties on a member state. Genuine protection and assistance by the member state can only come from the meaningful application of the general implementation measures, developing a children's rights perspective and truly respecting the four basic principles in the CRC. In this way, the protection needs of all unaccompanied child asylum seekers and refugees can be assessed and international child refugee protection expanded and enforced.

The establishment of the EU and the elimination of internal borders brought with it the freedom of movement and the opportunity to find common minimum standards for the protection of the human rights of all European peoples and those within their borders. To implement the standards called upon by the 1951 Refugee Convention, the EU

²⁹⁶ See footnote 54 for full reference.

²⁹⁷ Part 3 of European Commission 'Action Plan' 6-8 [footnote 54].

²⁹⁸ Part 4 of European Commission 'Action Plan' 8-12 [footnote 54].

²⁹⁹ Part 5 of European Commission 'Action Plan' 12-15 [footnote 54].

³⁰⁰ Price A 'Enduring Solutions in the Midst of "Crisis": Refugee Children in Europe' in Ensor MO and Goźdiak EM (eds) *Children and Forced Migration: Durable Solutions During Transient Years* (Springer International Publishing 2016) 25-49 33.

³⁰¹ Paragraph 6 of General Comment No. 6 [footnote 179].

drafted the CEAS to regulate all aspects of asylum and of refugeehood. The CRC is of no less importance in the implementation of the common minimum standards in Europe for the unaccompanied asylum-seeking and refugee child. It is clear, however, that the theory and the practical application and importance of the CRC is failing to be recognised in the member states. There is a strong reluctance of member states to accept responsibility, there is a growing culture of disbelief and suspicion of these children, and poor implementation of the law and policy, which ultimately cultivates a loss of trust by the children. The result is a double exclusion for the unaccompanied children because not only are they alone but they also face a European protection system that is reluctant to provide protection.

Chapter Four: The concept and content of durable solutions for the refugee child

4.1 Introduction

During a time of crisis, international refugee protection is a temporary substitute for national protection in one's country of origin. Vulnerable unaccompanied children are especially reliant on international protection efforts and on member states to provide adequate protection and assistance. Having argued in the previous chapter that the CRC expands the level of protection of migrant children by *inter alia* guaranteeing all the rights in the CRC to all children, regardless of their background or status, international protection is a temporary solution. Although temporary, the protection of refugee children may in fact require longer-term, durable solutions due to ongoing war and devastation in their country of origin. This is particularly true for children, especially those who have some years before reaching the age of 18 years.

In 2015, 96 465 unaccompanied children applied for asylum in EU member states.³⁰² That number dropped slightly in 2016 to 62 930 unaccompanied children.³⁰³ It is the recognition of the extreme vulnerability of these children that should compel member states and Europe, as a whole, to continue striving to find durable solutions for the speedy processing and protection of refugee children. An unaccompanied minor is a child first. As an individual with a peculiar background, they come from somewhere where they had a home and they come to Europe for some reason. This is more than an emergency,³⁰⁴ it is a situation which necessitates a child not just fitting into the system, but rather that they have tailored solutions to continue supporting their development into adulthood. In this chapter, therefore, the focus will be on what it means for a solution to be durable for an unaccompanied child, the part played by the CRC in determining suitable solutions, and on what basis this decision is ultimately made.

³⁰² European Commission 'Compilation 2017' 21 [footnote 2].

³⁰³ European Commission 'Compilation 2017' 21 [footnote 2].

³⁰⁴ Costella P 'The rights of the child: the protection of children in migration' proceedings of day 2 of the side event on guardianship for unaccompanied children 10th European Forum on the Rights of the Child (28 November 2016) accessible as audio/video file on http://ec.europa.eu/newsroom/ust/item-detail.cfm?item_id=34456 (transcription of audio recording on file with author).

This chapter will commence with a more theoretical investigation of whether durable solutions are considered as providing protection, what makes a solution durable and the three common types of durable solutions in international law. Next, by distinguishing the common features of durable solutions, we are able to determine the role of the CRC in the determination process and the level to which member state authorities are held accountable when deciding the future protection for unaccompanied children. To that end, the investigation will identify the relevant children's rights that make up the foundation for true durable solutions.

4.2 The theory of 'durable solutions'

Neither the 1951 Refugee Convention, the 1967 Protocol nor the CRC contain the phrase 'durable solutions'. Like most international treaties, the broad language used sets out rights and obligations without being dogmatic about the manner of implementation thereof. This means that these treaties are deficient in content relating to solutions for specific categories of refugees, such as those requiring special protection and assistance like unaccompanied minors. The focus of these instruments, so far as they address child refugees, is protection.³⁰⁵ Goodwin-Gill considers 'protection' a term of art in the refugee discourse, having a particular meaning in the field of international law.³⁰⁶ According to him, 'protection' is comprised of a legal framework and a solutions framework.³⁰⁷ The legal framework is found in the treaties such as the 1951 Refugee Convention and the 1967 Protocol³⁰⁸ but also relevant international human rights treaties. The solutions framework, as the name suggests, focuses on the solutions in admission, reception and treatment of refugees, voluntary repatriation and assistance.³⁰⁹ The type of protection accorded depends on the

³⁰⁵ UNHCR 'Safe & Sound: What states can do to ensure respect for the best interests of unaccompanied and separated children in Europe' 13 <http://www.refworld.org/docid/5423da264.html> (Date of use: 17 May 2017).

³⁰⁶ Goodwin-Gill 1995 *IJCR* 406 [footnote 16].

³⁰⁷ Goodwin-Gill GS 'International Protection and Assistance for Refugees and the Displaced: Institutional Challenges and United Nations Reform' (Paper presented at the Refugee Studies Centre Workshop 'Refugee Protection in International Law: Contemporary Challenges' 24 April 2006 Oxford) 5-6.

³⁰⁸ Paragraph 3 of the UN General Assembly Office of the United Nations High Commissioner for Refugees A/RES/60/129 16 December 2005.

³⁰⁹ Goodwin-Gill 'International Protection' 6 [footnote 307]; Paragraph 9 of the Office of the United Nations High Commissioner for Refugees [footnote 308].

particular circumstances of the individual requesting such protection like environment, time and place and specific needs.³¹⁰ Part of providing protection to refugees is the search for durable solutions. In other words, a durable solution is a type of protection that is afforded to those whose circumstances call for it. To find out what a durable solution is, however, one must look to other instruments and to the practice of states.³¹¹

The word 'durable' means 'able to exist for a long time without significant deterioration in quality or value.'³¹² This definition gives content to the test of durability, a two-part test for long-term existence and continued quality. The phrase 'durable solution' is well-recognised and utilised often academically and by agencies such as UNICEF,³¹³ FRA,³¹⁴ UNHCR³¹⁵ etc. The flexible nature of the durable solution definition can be seen in various international documents and reports, which varies from being unadorned such as that contained in the UNHCR Resettlement Handbook:³¹⁶ '[a] durable solution for refugees is one that ends the cycle of displacement by resolving their plight so that they can lead normal lives', to a more elaborate, detailed understanding such as that in the UNHCR manual titled Safe & Sound:³¹⁷

[a] durable solution in the context of the unaccompanied or separated child is a sustainable solution that ensures that the unaccompanied or separated child is able to develop into adulthood, in an environment which will meet his or her needs and fulfil his or her rights as defined by the CRC and will not put the child at risk of persecution or serious harm. Because the durable solution will have fundamental long-term consequences for the unaccompanied or separated child, it will be subject to a [best interests determination]. A durable solution also ultimately allows the child to acquire, or to re-acquire, the full protection of a state.

³¹⁰ Goodwin-Gill 1995 *IJCR* 406 [footnote 16].

³¹¹ Goodwin-Gill 1995 *IJCR* 406 [footnote 16].

³¹² <https://www.merriam-webster.com/dictionary/durable> (Date of use: 16 May 2017).

³¹³ UNICEF 'Uprooted' 96 [footnote 9].

³¹⁴ FRA 'Current Migration' 13 [footnote 187].

³¹⁵ UNHCR 'Framework for Durable Solutions for Refugees and Persons of Concern' <http://www.unhcr.org/partners/partners/3f1408764/framework-durable-solutions-refugees-persons-concern.html> (Date of use: 22 November 2016).

³¹⁶ UNHCR 'UNHCR Resettlement Handbook' 28 <http://www.unhcr.org/46f7c0ee2.pdf> (Date of use: 16 May 2017).

³¹⁷ UNHCR 'Safe & Sound' 22 [footnote 305].

Despite the variation in definition, the ultimate aim in identifying a durable solution for an unaccompanied refugee child is to address all their protection needs, that the child's views feature prominently, and which ultimately leads to the end of the child being unaccompanied.³¹⁸ There are three traditionally recognised durable solutions: voluntary repatriation, local integration and resettlement.³¹⁹ Briefly, voluntary repatriation is where a refugee chooses freely to return to his country of origin to re-avail himself of national protection.³²⁰ Local integration is the permanent settlement and integration of the refugee in the host country, availing himself of that country's protection.³²¹ Resettlement is the transfer of the refugee to a third country which has agreed to admit them in order to 'share the burden' between states.³²² These solutions are considered durable because it promises an end to the refugees' dependence on international assistance and protection.³²³ The UNHCR, together with various international agencies, prefers safe and sustainable voluntary repatriation as a durable solution³²⁴ for the fundamental reason that there is no better protection than national protection. Interestingly, the three durable solutions merely indicate the refugee's geographical future.³²⁵ Still, identifying a durable solution for an unaccompanied refugee child remains crucial for the eventual full enjoyment of his or her fundamental rights and freedoms. Accordingly, several member states agree that the process of determining the durable solution is as important as the eventual attainment of the durable solution.³²⁶ It is therefore important

³¹⁸ Paragraph 79 of General Comment No. 6 [footnote 179].

³¹⁹ Paragraph 8 of 1950 UNHCR Statute [footnote 67]; UNHCR 'An Introduction to International Protection: Protecting Persons of Concern to UNHCR' 137 <http://www.refworld.org/docid/4214cb4f2.html> (Date of use: 16 May 2017).

³²⁰ UNHCR 'Resettlement' 31 [footnote 316].

³²¹ UNHCR 'Resettlement' 34 [footnote 316].

³²² UNHCR 'International Protection' 137 [footnote 319].

³²³ UNHCR 'Rethinking durable solutions' in *The State of The World's Refugees 2006: Human Displacement in the New Millennium* <http://www.unhcr.org/publications/sowr/4a4dc1a89/state-worlds-refugees-2006-human-displacement-new-millennium.html> 129 (Date of use: 9 May 2016).

³²⁴ UNHCR 'Facts and Figures' <http://www.unhcr.org/3fc754593.pdf>

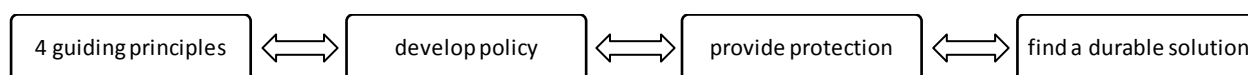
³²⁵ Arnold S *et al* 'Durable Solutions for Separated Children in Europe' 24 <http://www.irishrefugeecouncil.ie/children-and-young-people/durable-solutions-for-separated-children-in-europe> (Date of use: 3 May 2017); Goodwin-Gill 1995 *IJCR* 414 [footnote 14].

³²⁶ Arnold *et al* 'Durable Solutions' 15 [footnote 325] where a study on durable solutions for separated children was undertaken by nine organisations based in Belgium, Cyprus, England, Germany, Greece, Ireland, Malta, The Netherlands and Slovakia.

to discover the common features of the three durable solutions, and then to consider the workings of the durable solution determination process.

4.3 Distilling the common features of durable solutions

As was shown in Chapter Two, international protection for unaccompanied children requires a strong relationship between international refugee law and the CRC. Hence, determining a durable solution is a task that lies at the center of tension between the migration perspective and the children's rights perspective.³²⁷ This certainly requires reliance on the four guiding principles from the CRC. The CRC is the pillar upon which member states and the EU should lean, in order to establish a coordinated policy and to provide more creative solutions than the mere shepherding of vulnerable children into refugee camps.³²⁸ Undoubtedly, the four guiding principles are crucial for the development of a coordinated policy and if this type of supportive intervention is not employed for the attainment of a durable solution, there can be no long-term protection of the refugee child.³²⁹ Essentially, the development of any refugee policy by the EU member states must champion a child's rights perspective.



The image above, developed by the author, pictorially describes the relationship between international refugee law and the level of protection required by the CRC when developing regional or national policy for the provision of solutions that are durable. Reading in the direction of left to right, the relationship can be described as follows: the four guiding principles inform the content of policy and help in the development of policy, which in turn provides the necessary international protection of the refugee child. In providing protection, the supportive intervention allows authorities to determine the best durable solution. Studying the image in the reverse order, that is, right to left, the relationship shows: by achieving a suitable durable solution for a child, states relieve

³²⁷ Arnold *et al* 'Durable Solutions' 22 [footnote 325].

³²⁸ Kaime *Normative Framework* 424 [footnote 132].

³²⁹ UNHCR 'Reach Out Training Materials: Module 9 Durable Solutions' <http://www.unhcr.org/437205fd2> (Date of use: 22 November 2016).

pressure on the system that is aimed at providing temporary international protection. By having a system of protection that facilitates finding durable solutions, the system can inform the development of policy by its successes and failures, a sort of evaluation mechanism, and such a policy will represent the respect and implementation for the four guiding principles.

When an unaccompanied child arrives in the EU without parental protection, the CRC provides in Article 20 that a child deprived of his or her family environment, either temporarily or permanently, is entitled to special protection and assistance by the state. The child is wholly dependent upon the member state to uphold their rights.³³⁰ In these instances, Verstegen³³¹ observed that there is a difference between the sort of state intervention required on behalf of an indigenous child and the unaccompanied refugee child. Where there is a break in, or a threat to, the development of the indigenous child, forced state intervention is required to change the situation of the child. Conversely, where there are no parents,³³² there is a vacuum in authority for the unaccompanied child and they require supportive and nurturing intervention, not a change in situation. Supportive intervention comes in the form of a solution that passes the test of durability. The three common forms of durable solutions indicate the geographical future of the child but it is also clear that there are further features that are common to the three solutions.³³³ In considering the common characteristics, the three durable solutions provide answers to the migration crisis but also demand that the child's rights perspective be upheld. A good summary of the common features is provided by Kanics and Senovilla Hernández: 'every separated child has the right to a timely decision, in line with their best interests, which will secure their long-term stability, safety and welfare.'³³⁴

³³⁰ Van Bueren *International Law* 371 [footnote 128].

³³¹ Verstegen T 'The rights of the child: the protection of children in migration' proceedings of day 1 of the side event on guardianship for unaccompanied children 10th European Forum on the Rights of the Child (28 November 2016) accessible as audio/video file on http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=34456 (transcription of audio recording on file with author).

³³² This also applies to any vacuum in authority such as an absence of the legal or customary primary caregiver.

³³³ Arnold *et al* 'Durable Solutions' 24 [footnote 325]..

³³⁴ Kanics J and Senovilla Hernández D 'Protected or merely tolerated? Models of reception and regularization of unaccompanied and separated children in Europe' in *Migrating Alone:*

4.3.1 A timely decision that contributes to the full development of the child

Refugee and migrant children yearn for a family unit and safety, they wish to enjoy an education, protection, and a community where they are welcome.³³⁵ In order to achieve these goals, it is important for member states to plan for permanence, or durability, through childhood and beyond.³³⁶ Goodwin-Gill justifiably reasons that in order for solutions for children to be durable, they 'must contribute now to the full development of the child'³³⁷ – the first feature common to durable solutions. A timely decision allows the child to enjoy the protection solution for as long a time as possible before reaching the age of majority. It also reduces the period where the child is in a non-supportive, non-nurturing situation. The development of a child cannot be paused and postponed to some later date.³³⁸ The aim is to find a durable solution for a child at 15 years that can carry him forward over 18 years.³³⁹ For instance, it has been reported in the case of the Bhutanese Lhotshampas in the refugee camps in south-eastern Nepal that despite the relatively high standard of the camps, the young people who grew up in these camps during the 1990s are now experiencing frustration due to lack of further education and employment. This has led to increased suicide rates, alcoholism, domestic violence and trafficking of women and children.³⁴⁰ The solutions thus provided were beneficial at first but as the refugees grow into young adults, they actually hinder further beneficial development. The durability of these solutions needs to be reassessed. Similar examples can be found in Europe, where children spending long periods of time awaiting a decision on their asylum claim is adversely affecting their

Unaccompanied and Separated Children's Migration to Europe (UNESCO Publishing Paris 2010) 15.

³³⁵ UNHCR 'The Way Forward to Strengthened Policies and Practices for Unaccompanied and Separated Children in Europe' <http://www.refworld.org/docid/59633afc4.html> (Date of use: 29 August 2017) wherein unaccompanied and separated children were consulted and their comments regarding safety, education and protection were published throughout the document.

³³⁶ Arnold *et al* 'Durable Solutions' 20 [footnote 325].

³³⁷ Goodwin-Gill 1995 *IJCR* 407 [footnote 16].

³³⁸ Goodwin-Gill 1995 *IJCR* 407 [footnote 16].

³³⁹ Finch N 'The protection of children in migration' proceedings of day 2 of 10th European Forum [footnote 304].

³⁴⁰ UNHCR 'Protracted refugee situations: the search for practical solutions' *The State of The World's Refugees 2006: Human Displacement in the New Millennium* 116 <http://www.unhcr.org/publications/sowr/4a4dc1a89/state-worlds-refugees-2006-human-displacement-new-millennium.html> (Date of use: 9 May 2016).

mental health and well-being.³⁴¹ These children are experiencing isolation, crowding, sensory overload and language problems. These experiences may lead to further feelings of loss of control and meaningfulness, ultimately contributing to the development of mental illness in children³⁴² – if not extreme acts, such as involvement in criminality or even suicide. On the other hand, there are also examples of procedures where the child is closely involved in charting a plan that reaches beyond turning 18 years old, well into adulthood. This is the case in Norway, where a procedure clearly shows the reality that decisions have consequences for the lifetime of that child.³⁴³

The point of departure of this particular feature lies in Article 6 of the CRC, the child's right to survival and development – one of the four foundational principles. The best durable solution for a refugee child is one that commits to guaranteeing the legal and social aspects of the right to survival, that is to say, the absolutely essential steps necessary to ensure a life of human dignity and the provision of essential, life-sustaining services, respectively.³⁴⁴ With true survival, there can be wholesome development. The violation of one right of the child often reinforces their subjection to other abuses; for example, a denial of the right to an adequate standard of living may create a particular vulnerability to forced labour, violence, abuse and other forms of exploitation.³⁴⁵ A denial of the child's right to adequate nutritional requirements may result in serious health and developmental problems.³⁴⁶ It is essential that the chosen durable solution is implemented without delay to encourage constant developmental progression and improvement of well-being. The sooner a child is able to embrace the durable solution, the sooner that child can focus on the development of his talents and abilities, his understanding of his responsibilities and solidarity toward his community. It is accepted

³⁴¹ UNHCR 'A New Beginning: Refugee Integration in Europe' 71 <http://www.unhcr.org/protection/operations/52403d389/new-beginning-refugee-integration-europe.html> (Date of use: 22 November 2016).

³⁴² Nielsen SS *et al* 'Mental health among children seeking asylum in Denmark – the effect of length of stay and number of relocations: a cross-sectional study' 2008 *BMC Public Health* 294.

³⁴³ UNHCR *Safe & Sound* 40 [footnote 305].

³⁴⁴ See Chapter Three, the discussion regarding the right to survival and development as a foundational principle of the CRC.

³⁴⁵ UNHCR 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees' 8 <http://www.refworld.org/docid/4b2f4f6d2.html> (Date of use: 16 January 2017).

³⁴⁶ Van Bueren *International Law* 368 [footnote 128].

that the indigenous European child will reach legal adulthood, and all that goes with it, at the age of 18 years³⁴⁷ and his development is rooted in participation in, contribution to, and enjoyment of economic, social, cultural and political development.³⁴⁸ Assuming there has been very little to no break in their development, the European child is assumed to be capable of being a functional, independent individual within his community as he reaches adulthood.³⁴⁹ A child refugee cannot fairly be considered at the same level of independence and development as an indigenous child at 18 years. Reports have acknowledged that turning 18 does not mean the end of vulnerability or indeed, a total transition to adulthood.³⁵⁰ There has usually been a lengthy break in his development,³⁵¹ sometimes serious violations in his right to survival and development and any delay in finding a durable solution exacerbates that situation. How can an unaccompanied minor fleeing war, terrorism, extreme poverty etc. be expected to engage with his new legal status in the same way as his indigenous European contemporary?

Part of growing up and development of self, as an individual and in the community, is education.³⁵² Education and school provides a place of safety and support and where children and adolescents can make friends, find mentors and learn new skills. Education can boost a child's self-esteem and reduce child marriage, teenage pregnancy, child labour, sexual exploitation, trafficking and illegal adoption. It fosters the development of self-reliance and resilience, skills such as critical-thinking, problem-solving and teamwork.³⁵³ A school can provide a secure base for a child that cultivates

³⁴⁷ FRA 'Age of Majority' <http://fra.europa.eu/en/publication/2017/mapping-minimum-age-requirements/age-majority> (Date of use: 5 February 2018).

³⁴⁸ In line with the view of the CRC that children are right holders and Article 24 of the Charter [footnote 9] where they should participate and have their views taken into consideration.

³⁴⁹ This is based on norms and values and how society defines the age of adulthood. See FRA 'Age of Majority' [footnote 347] in this regard.

³⁵⁰ Arnold *et al* 'Durable Solutions' 45 [footnote 325]; UNHCR and Council of Europe 'Unaccompanied and separated asylum-seeking and refugee children turning 18: What to celebrate?' <https://www.coe.int> (Date of use: 21 June 2017).

³⁵¹ UNHCR 'Missing Out: Refugee Education in Crisis' <http://www.unhcr.org/57d9d01d0> (Date of use: 7 June 2017) where the UNHCR estimates that due to forced displacement, refugees miss out on three to four years of schooling.

³⁵² The World Bank considers expenditure on education as an 'investment in human capital' because 'without education development will not occur.'

³⁵³ UNHCR 'Missing Out' 5 [footnote 351].

a sense of community for the children and adults, thereby nurturing loyalty and commitment.³⁵⁴ The break in education is a break in development for so many refugee children and adolescents, which must be met with flexible education initiatives and systems.³⁵⁵ Education is an incredibly powerful tool that can lead to future peace and security and it could mitigate factors that led to the conflict and displacement in the first place.³⁵⁶ Education is such an important aspect of a child's life, particularly for those who have not enjoyed a consistent schooling experience, that the CRC emphasises its importance in Article 28 (the right to education). In addition, the CRC specifically provides in Article 29(1)(d) that education should be directed to '[t]he preparation of the child for responsible life in a free society'. Van Bueren opines that if this provision is constructively applied, it has the potential 'to overcome a feeling prevalent in child refugees that they are 'takers' rather than 'givers'.'³⁵⁷ UNICEF considers the right to education as the right to experience citizenship, where children are active participants in their learning process as citizens.³⁵⁸ Naturally, with education being such a fundamental part of the refugee child's life, the school and its educators are major assets when identifying a durable solution for an unaccompanied refugee child.³⁵⁹

4.3.2 *Individual solutions in the best interests of the child*

The design of durable solutions should be creative and transcend the political impediments to the refugee system.³⁶⁰ In contemplation of providing the best quality solution, that will be long-lasting, it must be an individual, fitted solution. The point of departure in establishing an individualised solution is Article 3(1) of the CRC concerning the best interests of the child. In the context of the EU, the best interests of the child principle underpins EU law and policy according to Article 24(2) of the Charter of

³⁵⁴ Arnold *et al* 'Durable Solutions' 51 [footnote 325].

³⁵⁵ UNHCR 'Missing Out' 28 [footnote 351].

³⁵⁶ UNHCR 'Policy Paper 26: No more excuses: Provide education to all forcibly displaced people' 2 <http://en.unesco.org/gem-report/no-more-excuses#sthash.4vI8YXBJ.dpbs> (Date of use: 23 November 2016); See also Article 29 of the CRC.

³⁵⁷ Van Bueren *International Law* 370 [footnote 128].

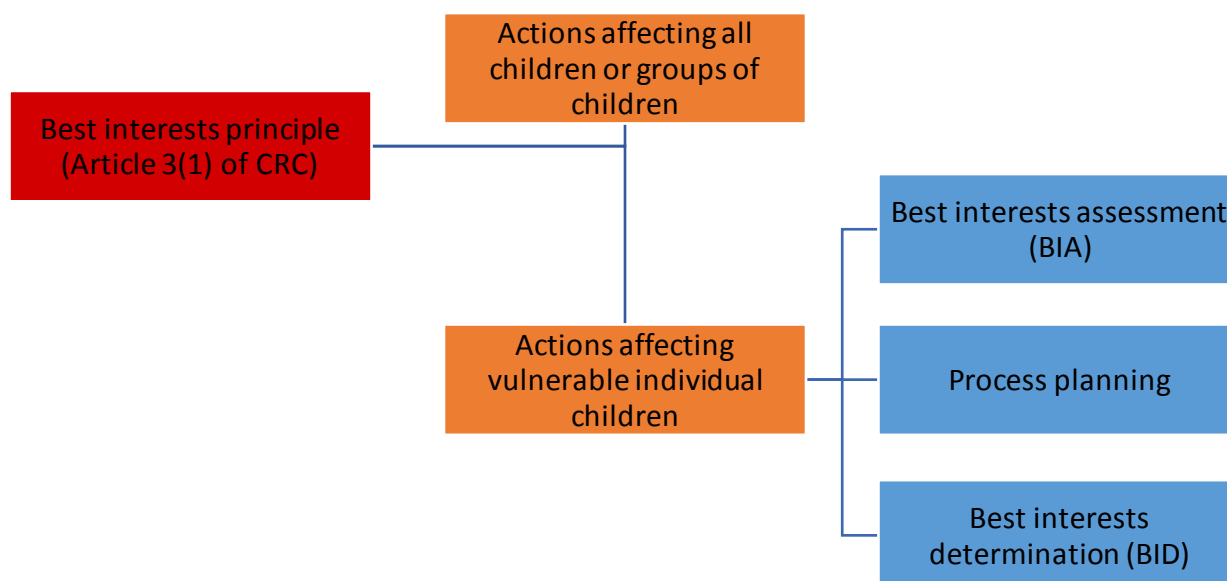
³⁵⁸ UNICEF 'Participation' 3 [footnote 256].

³⁵⁹ Arnold *et al* 'Durable Solutions' 51 [footnote 325].

³⁶⁰ Kanics and Senovilla Hernández *Protected or merely tolerated?* 16 [footnote 334].

Fundamental Rights of the European Union.³⁶¹ The best interests principle is defined by the Committee on the Rights of the Child as a three-fold concept: as a substantive right of the child, as a legal principle of interpretation and as a rule of procedure in the decision-making process.³⁶² As a substantive right, the child can have his best interests assessed and taken as primary consideration.³⁶³ As a legal principle, the interpretation of a provision that serves the best interest of the child is the one that prevails.³⁶⁴ Finally, as a rule of procedure in the decision-making process, the best interests principle requires an evaluation of the interests of the child, and the impact of the decision on the child.³⁶⁵ The Committee advises that the best interests of the child be respected during all stages of the displacement cycle.³⁶⁶

Figure 1³⁶⁷



³⁶¹ Article 24(2) of the Charter provides that '[i]n all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.'

³⁶² Paragraph 6 of General Comment No. 14 [footnote 196].

³⁶³ Paragraph 6(a) of General Comment No. 14 [footnote 196].

³⁶⁴ Paragraph 6(b) of General Comment No. 14 [footnote 196].

³⁶⁵ Paragraph 6(c) of General Comment No. 14 [footnote 196].

³⁶⁶ Paragraph 19 of General Comment No. 6 [footnote 179].

³⁶⁷ 'Figure 1 From theory to practice: applying the best interests principle' in UNHCR *Safe & Sound* 16 [footnote 305].

To better illustrate the application of the best interests principle, the figure above has been fashioned on the figure published by the UNHCR in their document entitled *Safe & Sound*. The figure indicates at the first junction, the two ways that the best interests principle is applied. In actions affecting all or groups of children, authorities rely on measures of a general nature, such as legislation, policies, procedures and resource allocation, that inform and affect the best interests process for individual children. In actions affecting individual children, like those who arrive unaccompanied, authorities must rely on measures that can identify the best interests of that child. These measures include the initial best interests assessment (the BIA) and process planning and thereafter, the best interests determination (the BID). The BIA procedure addresses short-term accommodation, care, age assessments, family tracing, health and education, while process planning allows authorities to decide which international protection or immigration process is in the best interests of the child. These two concepts and the BID are part of one, continuous process which should start from the moment an unaccompanied child has been identified as such, and end when the child has obtained a durable solution.³⁶⁸ Although the three procedures are holistic in nature, the two initial processes are beyond the scope of this study. The analysis will focus on the formal procedure of the BID that is required to determine the durable solution for the individual child, address the child's care and protection needs, and resultant recommendation.

The best interests determination (BID), as a formal procedure, is a prerequisite to the decision of a durable solution.³⁶⁹ The aim of the BID is to examine the circumstances of the child to come close to understanding what durable solution will be in the best interests of that child.³⁷⁰ A thorough consideration of the particular circumstances of the individual places the authorities in a better position to provide the best international protection. Choosing a durable solution is a significant decision and will have a

³⁶⁸ UNHCR *Safe & Sound* 19 [footnote 305].

³⁶⁹ Kanics and Senovilla Hernández *Protected or merely tolerated?* 15 [footnote 334]; UNHCR *Safe & Sound* 20 [footnote 305].

³⁷⁰ UNHCR *Safe & Sound* 45 [footnote 305].

fundamental impact on that child's future development.³⁷¹ The basic principle set down by the Committee establishes that 'where a decision will have a major impact on a child or children, a greater level of protection and detailed procedures to consider their best interests is appropriate.'³⁷² To this end, all interviews and consultations as part of the BID must be documented.³⁷³ The BID is a clear, comprehensive assessment that records the child's identity by establishing their nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.³⁷⁴ This is no closed list of factors to consider and each determination of the best interests of the child is specific to that child, where decision-makers need to appreciate and balance the competing rights of the child.³⁷⁵ The list provided by the Committee is a guide to working with the overarching best interests principle, by allowing it to function as the three-fold concept of substantive right, interpretation principle and rule of procedure simultaneously.³⁷⁶ In addition to the list provided in General Comment No. 6, organisations such as the UNHCR provide a list of considerations to assist the various stakeholders when conducting the BID in practice.³⁷⁷ This list is more detailed but still non-exhaustive and commences with establishing the child's identity, relating to age, gender, nationality, religion etc. Thereafter, if there are parents or caregivers, their views must be established and considered, in addition to the views of the child. Actors should consider what it means to preserve the child's family environment and whether there are relationships to be restored and maintained. Actors should also take into account the child's care, protection and safety and any situation of vulnerability, such as specific physical, mental or emotional needs. Actors must also respect the right of the child to health and access to education by considering their individual needs.

³⁷¹ UNHCR *Safe & Sound* 20 [footnote 305]; See also the discussion on the procedures in Norway in paragraph 4.3.1 of this paper.

³⁷² Paragraph 20 of General Comment No. 14 [footnote 196].

³⁷³ Paragraph 19 of General Comment No. 6 [footnote 179].

³⁷⁴ Paragraph 20 of General Comment No. 6 [footnote 179].

³⁷⁵ Kanics and Senovilla Hernández *Protected or merely tolerated?* 16 [footnote 334].

³⁷⁶ Senovilla Hernández and La Grange 'Legal Status of Unaccompanied Children' 9 [footnote 180] consider the BID a procedure that does not account for the child's best interests in the medium and long-term and thus a determination of a durable solution that can respond to that child's situation.

³⁷⁷ UNHCR *Safe & Sound* 42 [footnote 305].

The universality and dynamic nature of the best interests principle demands that the durable solution for the unaccompanied child be individual and serve the best interests of the child. The purpose of conducting a BID is to ensure a fitted, individualised durable solution that supports the development of the child as a whole and allows the full and effective enjoyment of his or her rights.³⁷⁸ This type of determination inevitably takes time and resources, placing pressure on systems and thereby, creating a delay in addressing the needs of unaccompanied children and causing further vulnerability.³⁷⁹ Then again, inaction, failure to take an action or an omission is also an 'action' in Article 3(1) of the CRC dealing with 'all actions concerning children'.³⁸⁰ Consequently, a failure or an unreasonable delay by authorities to initiate the best interests assessment and the BID could ultimately fail the best interests of the child assessment.

4.3.3 Long-term stability, safety and welfare

As we know, the durability of a solution lies in its ability to exist for a long time while preserving its quality and value. In the case of unaccompanied refugee children, this means, at a minimum, long-term, quality stability, safety and welfare. It is the consensus of several member states, however, that a durable solution means much more.³⁸¹ We have seen that a durable solution should promote positive development of the child, it should also be in the best interests of the child in relation to care, immigration, protection and safety from serious harm or persecution. The purpose of finding a durable solution for the unaccompanied refugee child is to determine a path or plan for the future of the child that enables them to become the best they can be.³⁸² It is for that reason that a durable solution, as accurately set out by Arnold *et al*, must also be sustainable, adaptable, inclusive, effective and long-lasting.³⁸³

Although the long-term character of a durable solution is informed by all four foundational principles, the point of departure lies in the right to participation in terms

³⁷⁸ Paragraph 4 of General Comment No. 14 [footnote 196]; UNHCR *Safe & Sound* 43 [footnote 305].

³⁷⁹ Kanics and Senovilla Hernández *Protected or merely tolerated?* 14 [footnote 334]; Arnold *et al* 'Durable Solutions' 20 [footnote 325].

³⁸⁰ Paragraph 18 of General Comment No. 14 [footnote 196].

³⁸¹ Arnold *et al* 'Durable Solutions' 20 [footnote 325].

³⁸² Arnold *et al* 'Durable Solutions' 20 [footnote 325].

³⁸³ Arnold *et al* 'Durable Solutions' 21-22 [footnote 325].

of Article 12(1) of the CRC. The right to participation requires that in determining the child's status and in providing durable solutions, the child's views should be a key feature in the decision-making process.³⁸⁴ In embracing the long-term considerations of the child, actors must keep in mind that the child is an active subject of the rights in the CRC. The unaccompanied refugee child has the right to influence his own life that is independent of his categorised vulnerability and his dependency on adults.³⁸⁵ We also know that the views of the child must be given its due weight, in accordance with the age and maturity of the child. Also, development and cooperation are far more valuable when the intended end user is involved in a meaningful way. Thus, long-term applicability and efficacy of a durable solution is best determined with the active and meaningful involvement of the child.³⁸⁶ Active and meaningful involvement means the child and the authorities jointly define the objectives on the child's future prospects.³⁸⁷ But active and meaningful participation does not occur in isolation and it must continue to promote the best interests of the child, without discrimination, to provide a long-term response to their needs and the positive growth and development demanded by the CRC.³⁸⁸ Indeed, the Committee states that the best interests principle and the right to be heard are inextricably linked and complementary to one another: the former aims to realise the child's best interests and the latter provides the method for hearing and including the child in the decision-making process.³⁸⁹

In the short-term, member states tend to provide temporary accommodation, education, care etc. but refugee situations do not lend themselves to quick solutions³⁹⁰ and delays in finding a durable solution can result in 'ageing-out'.³⁹¹ The long-term character of a

³⁸⁴ Van Bueren *International Law* 365 [footnote 128].

³⁸⁵ Paragraph 18 of General Comment No. 12 [footnote 252].

³⁸⁶ Farrugia R and Touzenis K 'The international protection of migrant children in Europe' in Senovilla Hernández D, Touzenis K and Kanics J (eds) *Migrating Alone: Unaccompanied and Separated Children's Migration to Europe* (UNESCO Publishing Paris 2010) 24-25.

³⁸⁷ Hammarberg T 'Unaccompanied and separated migrant children in Europe: legal perspectives' in Senovilla Hernández D, Touzenis K and Kanics J (eds) *Migrating Alone: Unaccompanied and Separated Children's Migration to Europe* (UNESCO Publishing Paris 2010) 177.

³⁸⁸ Paragraph 68 of General Comment No. 12 [footnote 252].

³⁸⁹ Paragraph 43 of General Comment No. 14 [footnote 196].

³⁹⁰ Van Bueren *International Law* 365 [footnote 128].

³⁹¹ European Union Agency for Fundamental Rights (FRA) 'Key migration issues: one year on from initial reporting – October 2016' 2 <http://fra.europa.eu/en/publication/2016/key-migration-issues-one-year-initial-reporting> (Date of use: 20 June 2017)

durable solution is that it is supposed to apply to the child at any age and carry him over the age of 18 years. The problem occurring in EU member states starts when the specific rights offered to unaccompanied children as a vulnerable group disappear the day they become an adult.³⁹² There is an ugly trend in immigration agencies where purposeful delays in initiating the process of finding a durable solution force the child to 'age-out' of the process.³⁹³ The young adult is now subject to the normal rules and procedures of asylum and immigration and can no longer benefit from the rights in the CRC. It is literally a waiting game, where from one day to the next, the legally resident child becomes an irregular migrant adult, at risk of expulsion.³⁹⁴ Any catered-for, short-term care and welfare needs such as integration, education and child-specific accommodation are at serious risk of being removed. These young adults may be forced into restarting their application for refugee status as an adult, navigating a complex legal process in a foreign language without adequate advice, or alternatively, begin an underground life.³⁹⁵ Indeed, the status of an unaccompanied child is of such significance that it is considered the main barrier to realising durable solutions.³⁹⁶ One of the consequences of children waiting for status determination is the difficulty they have in exercising their fundamental rights and freedoms. It is not a solution to allow unaccompanied children to remain under humanitarian or other forms of protection until they reach the age of 18. The waiting and uncertainty can have a severe psychological impact on the child and when children are depressed, they are not able to actively participate in the decision-making processes thus devaluing the right to participation.³⁹⁷ Unless individually tailored durable solutions are established, the best interests of the child and their successful development into a young adult may be threatened.³⁹⁸ Hammarberg says that 'Europe cannot afford to fail our young newcomers; their fate is

³⁹² Hammarberg *Legal Perspectives* 178 [footnote 387].

³⁹³ FRA 'Key migration issues' 6 [footnote 391]; European Commission 'Compilation 2017' 46 [footnote 2].

³⁹⁴ Hammarberg *Legal Perspectives* 178 [footnote 387].

³⁹⁵ Paragraph 3 of the House of Lords 'Children in Crisis' 6 [footnote 225].

³⁹⁶ Arnold *et al* 'Durable Solutions' 55 [footnote 325].

³⁹⁷ Van Bueren *International Law* 365 [footnote 128].

³⁹⁸ UNHCR *Safe & Sound* 49 [footnote 305].

ours and they have much to contribute – if given a chance. The first step is to recognize that they have human rights.’³⁹⁹

4.4 Conclusion

As an unaccompanied child arrives at the borders of the EU requesting international protection, member states are under an international duty to provide protection. International protection is informed by its legal and solutions framework, but the type of protection that the child will receive depends on his or her personal circumstances. A durable solution is an essential element of international protection that caters to the long-term needs and vulnerabilities of the unaccompanied child. Despite its variable definition, the three better-known durable solutions share common features that are underpinned by the four foundational principles that reinforce the attainment of a child’s rights perspective. In essence, a durable solution must first, be implemented timeously in a manner that promotes the full and positive development of the child; second, be tailored to the best interests of the child and third, be sustainable and a long-term response to the needs of the child.

To determine the type of durable solution that will best serve the unaccompanied child over the age of 18, member state authorities must conduct a best interests determination. Such a process reflects the individualised approach that is so characteristic of the 1951 Refugee Convention’s approach to status determination of refugees. Since the decision of the best durable solution has a major impact on the future of the child, the Committee’s reiteration that the greater the impact of the decision taken on behalf of the child, the more safeguards are required during the deliberation process, must be honoured. The BID that is conducted is a formal process that evaluates and records every part of the child’s history and future. The flexible nature of the best interests principle means that it responds to a specific situation and can evolve according to the circumstances. It also means that it can be, and has been, manipulated by states to justify unfair policies or by actors who believe that the best interests of the child are irrelevant or unimportant.⁴⁰⁰ Then again, the obligation on the member state,

³⁹⁹ Hammarberg *Legal Perspectives* 178 [footnote 387].

⁴⁰⁰ Paragraph 34 of General Comment No. 14 [footnote 196].

that stems from the right of the child to active and meaningful participation, is one of reciprocity. The authorities who are involved must, thus, also actively participate in a meaningful way and not merely as bystanders recording facts in a mechanical manner. Importantly, the BID must be conducted as soon as possible after the unaccompanied child has requested protection, to prevent further vulnerability to the child and to afford the child the time and opportunity to embrace himself as an individual with views and feelings of his own and to be the subject of civil and political rights as well as special protections.

Chapter Five: The Common European Asylum System (the CEAS)

5.1 Introduction

To find a durable solution for the unaccompanied child is first prize when honouring international refugee and child law. It gives the member state authorities the opportunity to learn all there is to know about the child before them and calls on them to provide a type of protection that will support the child's long-term needs and vulnerabilities. There can be no better outcome for a child who has been forced – at risk of loss of life – to flee his home country.⁴⁰¹ As the previous chapters have shown, the CRC and the Comments by the Committee provide the legal principles and set the standards for all member states to follow, even in periods of emergency.

This chapter will focus on the emergency legislative steps taken by the European bodies that affects the way unaccompanied children are processed. The main examination will be whether the temporary relocation scheme, enacted in 2015, has helped to protect the unaccompanied children arriving in Europe. The aim of providing international protection to children has always been to protect, relieve, assist and provide for their well-being and development. Therefore, if the end goal is finding a durable solution for the child, the steps preceding the attainment of a durable solution must contribute to that end goal. This requires that every piece of legislation and action taken to achieve a durable solution must respect the four foundational principles from the CRC, consistent with the knowledge that unsuitable policies, procedures and insensitive and untrained refugee reception personnel further oppress and terrify unaccompanied minor refugees.⁴⁰²

The analysis of the type of protection afforded to children in the emergency period, and to gain further insight into the temporary relocation scheme, we take a closer look at the various instruments as they apply to children and whether there is the requisite respect for the development of a children's rights approach. In this regard, the

⁴⁰¹ UNHCR 'International Protection' 103 [footnote 319].

⁴⁰² Bhabha J and Crock M *Seeking asylum alone: A Comparative Study of Laws, Policy and Practice in Australia, the UK and the US* (Themis Press Sydney 2007) 189.

European Agenda on Migration, the September Decisions and the Dublin III Regulation will be critically analysed. The investigation will continue to explore the mechanism provided by the temporary relocation scheme and how the scheme functions in reality. To this end, the discussion will include a case study of an unaccompanied child who is a candidate for relocation under the scheme and an examination of the factors that will affect his relocation and attainment of a durable solution. For purposes of ensuring a balanced study, the chapter includes an analysis of reports by European bodies with regard to the situation of unaccompanied children in the Dublin system and an assessment of the relocation scheme. This analysis will cover the specific actions taken by member states under the scheme – whether good or bad – that has resulted in the relocation of a mere 390 unaccompanied minors.⁴⁰³ Finally, the chapter will include an in-depth discussion on the differences between the procedure to find a durable solution for an unaccompanied child with family legally present in Europe and one who has no family present in Europe.

5.2 Examining the children's rights approach in the Dublin system

Developing a children's rights perspective requires not only a change in the legislation but also a change in the perception of the child's place in society and this could not be truer for an unaccompanied refugee child in Europe.⁴⁰⁴ A children's rights perspective also increases sensitivity to the impact that authorities in migration have on children and their human rights.⁴⁰⁵ To truly develop a children's rights perspective, it must integrate the four foundational principles from the CRC in every measure that affects children. It is therefore prudent to examine the *ad hoc* solutions to patch up the EU asylum system⁴⁰⁶ and Dublin III system to see whether there is respect for the development of a children's rights perspective.

⁴⁰³ European Commission 'Fourteenth Report on Relocation and Resettlement' COM (2017) 405 final 5 https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170726_fourteenth_report_on_relocation_and_resettlement_en.pdf (Date of use: 31 July 2017).

⁴⁰⁴ Paragraph 12 of General Comment No. 5 [footnote 58].

⁴⁰⁵ Paragraph 10 of General Comment No. 5 [footnote 58].

⁴⁰⁶ Selanec NB 'Critique of EU Refugee Crisis Management: On Law, Policy and Decentralization' 2015 *Croatian Yearbook of European Law and Policy* 84.

5.2.1 A closer look at the Agenda and September Decisions

The point of departure in all matters affecting children in Europe is that the best interests of the child must be a primary consideration as required by Article 3(1) of the CRC and Article 24(2) of the Charter.⁴⁰⁷ If we consider the Agenda and the September Decisions, the protection gaps start showing. The Agenda mentions refugee children only twice in the entire document. It provides first, that one of the priorities is the coherent implementation of the CEAS, paying particular attention to the most vulnerable groups such as children.⁴⁰⁸ The Commission then goes on to promise a comprehensive strategy to follow the Action Plan on Unaccompanied Minors (2010-2014).⁴⁰⁹ Unfortunately, at the end of the Action Plan in 2014, no further instruments catered to the specific needs of the unaccompanied child until 2017 when the Commission published its communication on the protection of children in migration⁴¹⁰ and the Council of the EU adopted its conclusions on children in migration.⁴¹¹ During the 10th European Forum on the Rights of the Child, the common concern among all parties was the absence of instruments dedicated to the protection of unaccompanied refugee children.⁴¹² The second brief mention of children in the Agenda is in relation to providing resources for the effective integration of refugees and children.⁴¹³ Similarly, the September Decisions each mention ‘the best interests of the child’ in one particular place, namely in Article 6(1). Reference is made to unaccompanied minors insofar as member states are to apply the provisions of the Dublin III Regulation relating to the special protection of unaccompanied minors in full.⁴¹⁴ Dublin III is certainly an

⁴⁰⁷ Charter of Fundamental Rights of the European Union [footnote 11].

⁴⁰⁸ European Commission ‘Agenda’ 12 [footnote 38].

⁴⁰⁹ Footnote 28 of the European Commission ‘Agenda’ 12 [footnote 38].

⁴¹⁰ European Commission ‘The protection of children in migration’ [footnote 56].

⁴¹¹ Council of the European Union ‘Conclusions of the Council of the European Union and the representatives of the governments of the Member States on the protection of children in migration’ 8 June 2017 Doc 10085/17.

⁴¹² European Commission ‘10th Annual European Forum’ [footnote 55].

⁴¹³ European Commission ‘Agenda’ 16 [footnote 38].

⁴¹⁴ Paragraph 19 of Council Decision (EU) 2015/1523 of 14 September 2015 148 [footnote 51]; Paragraph 24 of Council Decision (EU) 2015/1601 of 22 September 2015 11 [footnote 52].

improvement on its predecessor, the Dublin II Regulation, in terms of providing a focus on unaccompanied children.⁴¹⁵ Dublin III however, is still not infallible.

5.2.2 A closer look at the Dublin III Regulation

In order to evaluate the efficacy of Dublin III in protecting unaccompanied children, it is necessary to evaluate the implementation of Dublin III by member states during the time of the refugee crisis. Interestingly, several member states noted very few cases of receiving unaccompanied children in Dublin procedures⁴¹⁶ whereas other member states noted high numbers of these cases which inevitably lead to resource shortages and processing delays.⁴¹⁷ Garcés-Mascreñas identifies three criticisms of the Dublin system: that the system does not work fairly in terms of distribution of asylum seekers, that the system is inefficient and that it jeopardises refugees' rights.⁴¹⁸ All three criticisms levelled at the Dublin system have an impact on unaccompanied refugee children.

In terms of an unfair distribution of asylum seekers among member states, more persons seeking protection means more pressure on the protection system.⁴¹⁹ Inevitably more pressure means that the fraction of unaccompanied minors seeking protection do not receive the specialised care and protection they so desperately need. This problem has been a serious and persistent concern in Greece, Italy and Hungary: qualified staff are not present to identify these children, there are persistent delays in the appointment of a guardian thereby further delaying the children's access to

⁴¹⁵ In this regard, see the study requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs on various issues in the CEAS, particularly those issues relating to the unaccompanied minors and the Dublin procedure in Jaillard M 'Setting up a Common European Asylum System - Report on the application of existing instruments and proposals for the new system' 149-154 <http://www.refworld.org/docid/4e3bd6362.html> (Date of use: 2 November 2016). See also Lourens G *et al* 'Dublin for Guardians' 7 <https://engi.eu/projects/dublin-support-for-guardians/> (Date of use: 20 July 2017).

⁴¹⁶ In this case France, Italy, Lithuania, Latvia and Slovakia. This information is provided by the European Commission in the report: 'Evaluation of the Implementation of the Dublin III Regulation – Final Report' 15 https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_implementation_of_the_dublin_iii_regulation_en.pdf (Date of use: 20 July 2017).

⁴¹⁷ In this case Belgium, Greece, Hungary, Malta and Sweden. European Commission 'Evaluation' 15 [footnote 416].

⁴¹⁸ Garcés-Mascreñas B 'Why Dublin "doesn't work"' 2015 *Notes Internacionales* 1-5, 2.

⁴¹⁹ See the discussion in Section B by Mitchell 2017 *San Diego ILJ* 319-320 [footnote 155].

protection and adequate reception and the provision of specialised facilities remains a challenge.⁴²⁰ The lack of capacity caused by the large number of arrivals is not unique to the frontline member states, with Bulgaria, Cyprus, Sweden, Switzerland, Malta and Norway noting that the pressure has a direct impact on their ability to provide representatives to unaccompanied children.⁴²¹

As a system, the inefficiency of Dublin is rooted in the criteria that the asylum procedure is usually the responsibility of the country of first entry.⁴²² Tension arises because the country of first entry is not always the country the asylum seeker wishes to end up in.⁴²³ These preferences however, offend the very aim of the Dublin system – to prevent asylum shopping.⁴²⁴ Nonetheless, the four pillars of the CRC clearly oblige member states to take actions and decisions that are non-discriminatory and in the best interests of the child. That is, actions and decisions that promote the child's survival and development by encouraging meaningful participation.⁴²⁵ Indeed, these four principles thus demand the preferences of the unaccompanied asylum seeker child to be seriously considered. Dublin III does provide guarantees for minors in Article 6, with the best interests of the child being the primary consideration in all procedures provided for in the Regulation.⁴²⁶ Article 6(3) of Dublin III sets out the four factors to take into account in the assessment of the best interests of the child namely: the possibility of family reunification, the well-being and social development of the minor, safety and security considerations and lastly, the views of the minor in accordance with his age and maturity. However, the shared sentiment in member states is that there is no certainty on how to determine the best interests of the child.⁴²⁷ Farrugia and Touzenis view the best interests principle in the Dublin system as one that stands alone without guidelines on how to implement it, the principle remains vague leaving the interpretation to

⁴²⁰ FRA 'Key migration issues' 2 [footnote 391].

⁴²¹ European Commission 'Evaluation' 17 [footnote 416].

⁴²² Garcés-Mascareñas 'Dublin "doesn't work"' 1 [footnote 418].

⁴²³ Garcés-Mascareñas 'Dublin "doesn't work"' 2 [footnote 418].

⁴²⁴ Fratzke S 'Not Adding Up: The Fading Promise of Europe's Dublin System' 4 <http://www.migrationpolicy.org/research/not-adding-fading-promise-europes-dublin-system> (Date of use: 22 July 2017).

⁴²⁵ See the discussion on page 66 of this paper.

⁴²⁶ Article 6(1) of the Dublin III Regulation [footnote 17].

⁴²⁷ European Commission 'Evaluation' 15 [footnote 416].

member states' discretion and it seems difficult to reconcile the principle with the general rules of migration and asylum.⁴²⁸ In a report by the European Commission, it becomes clear that the member states each give their own interpretation when determining which factors are more important and how a final decision is reached.⁴²⁹ This was also confirmed by Germany, Denmark, the Netherlands, Sweden and the UK who participated in the report.⁴³⁰ Nevertheless, it seems that most member states still do not have any special procedure or guideline when making these determinations. Member states rather rely on the international guidelines published by the UNHCR, the Committee on the Rights of the Child or the FRA. In addition, the Czech Republic, Germany, Finland, Italy, the Netherlands, Norway, Poland, Sweden and the UK report that they also consult relevant stakeholders and experts on the best interests of the child.⁴³¹

Remarkably, the procedure to determine which member state is responsible for the asylum application for the unaccompanied minor who has family in the EU differs from that which applies to an unaccompanied minor who has no family in the EU. Article 8(1) and (2) of Dublin III provide that if there is a family member, sibling or relative legally present in another member state, it is that state who bears responsibility to process the unaccompanied child's asylum application, provided it is in the best interests of the child. In the absence of a situation where there is a family member, sibling or relative in the EU, it is again the country of first entry who bears responsibility for the asylum application, subject to the proviso that it must be in the best interests of the child.⁴³² In the latter case, the member state must still conduct a best interests assessment in accordance with the four factors provided by Article 6(3), always bearing in mind that the child cannot simply choose where he or she wishes to end up.

The third criticism levelled by Garcés-Mascreñas is that the Dublin system jeopardises the refugees' rights.⁴³³ The obstacle is that Dublin III is established upon the

⁴²⁸ Farrugia and Touzenis *Protection of Migrant Children* 39 [footnote 386].

⁴²⁹ European Commission 'Evaluation' 15-16 [footnote 416].

⁴³⁰ European Commission 'Evaluation' 16 [footnote 416].

⁴³¹ Lourens *et al* 'Dublin for Guardians' 12 [footnote 415].

⁴³² Article 8(4) of the Dublin III Regulation [footnote 17].

⁴³³ Garcés-Mascreñas 'Dublin "doesn't work"' 3 [footnote 418].

assumption that 'it should not matter which country you flee to'.⁴³⁴ In theory, this would be true, if all member states provided the same level of protection, social rights, reception conditions and opportunities for work and education. The reality is that there are significant differences between member states in their reception of asylum seekers and the asylum procedures, not to mention local attitudes to the new arrivals⁴³⁵ and their chances of integration into their new communities.⁴³⁶ Moreover, just because it is a child asylum seeker fleeing his own country, does not mean he is indifferent to where he ends up.⁴³⁷ The personal concerns of an unaccompanied child, like knowledge of the language, family, friends, acquaintances, future opportunities in education and labour often guide their preferences for a particular member state.⁴³⁸ The research and conclusions by clinical psychologist Dr V Kouratovsky⁴³⁹ show that it is radical breaks in or lack of familiar surroundings, referred to as a lack of 'envelopment',⁴⁴⁰ that leaves children vulnerable to stress. Furthermore, it is not only in reconnecting and feeling welcome in familiar and stable surroundings but also where there is stress buffering and enveloping opportunities that a child can recover and develop in his own best interests and those of society.⁴⁴¹ As part of the best interests assessment, in contemplation of a decision whether the child will remain in the country of first entry, there must be meaningful participation by the child in relation to the responsible authority.⁴⁴² What if the unaccompanied minor strongly prefers another member state rather than the state of first entry, without family, relatives or siblings in that member

⁴³⁴ The sentiment expressed by the then European Commissioner for Home Affairs, Cecilia Malmström in September 2012 which can be found in the article on 'Libyan Refugees in Tunisia' http://cecilia196.rssing.com/chan-12001148/all_p1.html (Date of use: 6 February 2018).

⁴³⁵ FRA 'Incitement in media content and political discourse in EU member states' 2 <http://fra.europa.eu/en/publication/2016/incitement-media-content-and-political-discourse-member-states-european-union> (Date of use: 24 April 2017).

⁴³⁶ Voices of Young Refugees in Europe (VYRE) 'Local participation and inclusion of unaccompanied minor refugees' 10 <https://rm.coe.int/16807031ae> (Date of use: 22 June 2017).

⁴³⁷ Garcés-Mascareñas 'Dublin "doesn't work"' 2 [footnote 418].

⁴³⁸ European Parliament 'EU asylum policy: reforming the Dublin rules to create a fairer system' 3 http://www.europarl.europa.eu/pdfs/news/expert/background/20171019BKG86403/20171019BKG86403_en.pdf (Date of use: 6 February 2018).

⁴³⁹ For more information about Dr V Kouratovsky see www.expatpsy.nl.

⁴⁴⁰ 'Envelopment' is a term coined by Dr Kouratovsky and is to be understood as providing 'a buffer and protection against stress by creating patterns and rituals, with proven effects on biological and (sub)conscious levels.' See www.expatpsy.nl (Date of use: 24 July 2017).

⁴⁴¹ Lourens *et al* 'Dublin for Guardians' 58 [footnote 415].

⁴⁴² In accordance with their right of participation in Article 12 of the CRC.

state? Will the Dublin procedure allow a transfer request to that member state based on the child's strong preference alone, bearing in mind the prevention of asylum shopping? If not, and the child is required to remain in the country of first entry, do the factors switch to a focus on the child in that particular state? In other words, does it become the objective assessment of the first member state's ability to provide the child with adequate support and protection, in his best interests, that determines whether he will stay in the country of first entry or not? Given this lack of clarity, it seems difficult to reconcile the best interests principle with the general rules of migration and asylum.⁴⁴³

Amnesty International's description of an unaccompanied minor is apposite (albeit that it was stated in the context of Africa): 'unaccompanied minor children are effectively left to gamble on an uncertain future in a foreign land'.⁴⁴⁴ Exacerbating and prolonging this uncertainty is the fact that the unaccompanied child inevitably faces poor reception facilities when he arrives in Europe;⁴⁴⁵ will probably encounter processing delays due to shortages in adequately child-trained staff or deliberate delays pursuant to the intention to ensure the 'ageing out' of the minor refugee;⁴⁴⁶ and then face an assessment procedure that, as a point of departure, determines that without family in another member state, he will have to remain in the country of first entry.⁴⁴⁷ The country of first entry may however, objectively not be able to properly care for the unaccompanied minor, or the situation for the child falls far short of the international standard for his survival and development and it may not be in their best interests at all to remain there.⁴⁴⁸ It is uncertain whether the Dublin procedure can be triggered in these circumstances alone. The best interests of the child are being pitted against the interests of the EU to prevent asylum shopping, when their preferences are as a result of their need for the most basic rights as refugees to be recognised which should far

⁴⁴³ Farrugia and Touzenis *Protection of Migrant Children* 39 [footnote 386].

⁴⁴⁴ Amnesty International 'Africa: In search of safety: The forcibly displaced and human rights in Africa' AFR 01/05/97 20 June 1997 6.

⁴⁴⁵ FRA 'Key Migration Issues' 3 [footnote 391].

⁴⁴⁶ See the discussion in paragraph 4.3.1. and European Commission 'Key Migration Issues' 2 [footnote 391].

⁴⁴⁷ In accordance with Article 8(4) of Dublin III Regulation [footnote 17].

⁴⁴⁸ There are various reports from member states where this is the case. See for instance the discussion of the reception conditions for unaccompanied children in FRA 'Key Migration Issues' 6-7 [footnote 391].

outweigh the feared asylum shopping.⁴⁴⁹ Faced with this sort of complicated, uncertain and delayed system, it would seem more advantageous for a minor child to evade the reception facilities in the first country, make their own way to their preferred member state and once there, reapply for asylum. The issue was raised in the Court of Justice of the European Union (CJEU) in *MA and Others v Secretary of State for the Home Department*.⁴⁵⁰ The question before the Court was which member state bore the responsibility for processing an asylum application where an unaccompanied minor, without family or relatives in the EU, had applied in two different member states. The CJEU held that Article 8(4) of Dublin III applying to the unaccompanied minor in this case

must be interpreted as meaning that ... the Member State in which that minor is present after having lodged an asylum application there is to be designated the 'Member State responsible'.⁴⁵¹

The second member state cannot return the unaccompanied child under the Dublin procedure and most member states confirm that they do not initiate Dublin transfers in such cases.⁴⁵² The decision has therefore created this gap for the tiniest fraction of refugees who are the most vulnerable members of society. There have been a number of reports of unaccompanied children simply not waiting for the procedure under the Dublin III Regulation and choosing rather to risk illegal travel on their own.⁴⁵³ This type of illegal onward travel places these children at risk of abuse, violence, trafficking, kidnapping and health-related issues.⁴⁵⁴ In this case, Eritrean unaccompanied minors register the second highest rate of absconding from reception facilities.⁴⁵⁵ A study in Sweden and data from Hungary and Italy show that children often also go missing when the temporary facility where they are housed during the first reception stage is well

⁴⁴⁹ Garcés-Mascreñas 'Dublin "doesn't work"' 2 [footnote 418]; see also Costella P 'The protection of children in migration' proceedings of day 1 of 10th European Forum [footnote 304].

⁴⁵⁰ *MA and Others v Secretary of State for the Home Department* 6 June 2013 C- 648/11 CJEU.

⁴⁵¹ Paragraph 66 of the judgement in *MA and Others v Secretary of State for the Home Department* [footnote 450].

⁴⁵² See the report by Lourens *et al* 'Dublin for Guardians' 18-38 [footnote 415].

⁴⁵³ Lourens *et al* 'Dublin for Guardians' 56 [footnote 415].

⁴⁵⁴ FRA 'Key Migration Issues' 4 [footnote 391].

⁴⁵⁵ European Commission 'Fourteenth Report' 7 [footnote 403].

below child protection standards.⁴⁵⁶ A case study describes the journey of such a child, where he travelled several days to the second member state in the loading space of a lorry with no food or anything to drink. He later told authorities that he had been very scared and stressed.⁴⁵⁷ Simply put, the asylum system focuses more on preventing irregular migration than on protecting the children who need the protection and support. At this juncture it is worth recalling McAdam's classification, which is that 'a child is foremost a child before he or she is a refugee, and protection needs must be assessed accordingly'.⁴⁵⁸

The power of using a children's rights approach and engaging children in the policies and measures that affect them is undeniable. In the city of Jönköping in Sweden, the authorities have decided to actively include unaccompanied children in the design and implementation of policies and measures intended for them. Unaccompanied children can participate in a meaningful way and co-decide about their housing. As regards their reception and integration, there is a long-term evaluation procedure in place whereby repeated focus groups monitor the progress in these fields.⁴⁵⁹

5.3 A closer look at the temporary European relocation scheme

The Agenda defines 'relocation' as 'a distribution among member states of persons in clear need of international protection'.⁴⁶⁰ The relocation scheme is a temporary, quick response to the high volumes of arrivals, intended to relieve the pressure on the frontline reception and processing facilities that are already stretched thin.⁴⁶¹ The thrust of the scheme is to ensure fair and balanced participation of all the member states, using an objective redistribution key.⁴⁶² The redistribution criteria – member state gross domestic product (GDP), population size, past number of asylum seeker applications and resettled refugees and the unemployment rate – are highly objective, verifiable and

⁴⁵⁶ FRA 'Key migration issues' 7 [footnote 391].

⁴⁵⁷ Lourens *et al* 'Dublin for Guardians' 56-57 [footnote 415].

⁴⁵⁸ McAdam 2006 *IJCR* 269 [footnote 127].

⁴⁵⁹ FRA 'Key migration issues' 7 [footnote 391].

⁴⁶⁰ European Commission 'Agenda' 19 [footnote 38].

⁴⁶¹ European Commission 'Agenda' 4 [footnote 38].

⁴⁶² European Commission 'Agenda' 19 [footnote 38].

quantifiable,⁴⁶³ because the focus is numbers, rather than humanitarian considerations or personal characteristics of the refugees who are to be moved.

Article 5 of the respective September Decisions⁴⁶⁴ provides the relocation procedure. This procedure involves the identification, notification and transfer of potential asylum seekers to a member state of relocation. It is in this assessment procedure where there may be a glimmer of hope for the unaccompanied minor, particularly one who has no family in another member state.

The procedures in Article 5 of the September Decisions respectively, begin with the requirement that each member state, including Greece and Italy, are to appoint a national contact point for communication relating to relocation procedures.⁴⁶⁵ It is the national contact point authorities that are tasked to regularly indicate the number of applicants who can be relocated to their territory, and any other information.⁴⁶⁶ Greece and Italy are tasked with identifying possible applicants, ensuring their fingerprints are recorded and transmitted to the Central System of Eurodac, and then submitting all relevant information to the contact point of the relocation member state.⁴⁶⁷ In this regard, Article 5(3) and paragraph 27 provide that priority shall be given to vulnerable applicants, such as unaccompanied minors, within the meaning of the Reception Conditions Directive.⁴⁶⁸ The Reception Conditions Directive requires a non-administrative assessment of the special reception needs of the vulnerable applicant, to be initiated within a reasonable period after application for international protection is made.⁴⁶⁹ Greece and Italy should then seek approval from the member state of relocation and once obtained, should take the decision to relocate and notify the applicant.⁴⁷⁰ The transfer must take place as soon as possible after notifying the

⁴⁶³ European Commission 'Agenda' 4 [footnote 38].

⁴⁶⁴ See footnotes 51 and 52 for full reference.

⁴⁶⁵ Articles 5(1) of the September Decisions.

⁴⁶⁶ Articles 5(1) of the September Decisions.

⁴⁶⁷ Articles 5(3) of the September Decisions.

⁴⁶⁸ See footnote 25 for full reference.

⁴⁶⁹ Article 21 and 22 of the Reception Conditions Directive [footnote 25]

⁴⁷⁰ Articles 5(4) of the September Decisions.

applicant, with Greece and Italy required to notify the member state of relocation with the date and time of the transfer.⁴⁷¹

What becomes clear is the continued resource pressure on Greece and Italy in this procedure. The frontline states are still required to fingerprint new arrivals, identify suitable applicants, assess and capture relevant information to be submitted to the relocating member state, get approval and organise the transfer of the asylum seeker. Greece and Italy must do all of this, in addition to prioritising vulnerable applicants like unaccompanied minors, by employing adequately trained staff who are in a position to assess the unique reception needs of those children and communicate the information to the relevant relocation states.

Further to this burden on Greece and Italy, Recital 28 and 34 of the 14 and 22 September Decisions, respectively, allows the member states of relocation to indicate their preferences for the type of applicant they wish to receive based on integration into the host society. To this end, the European Asylum Support Office (EASO) has developed a 'Matching Tool' to assist Greece in relocation.⁴⁷² The tool records the registration data of the applicant, such as family, cultural or social ties, language skills, professions, particular vulnerabilities, family composition and connected cases.⁴⁷³ The tool also accounts for the preferences of member states for certain applicants in terms of language skills, relevance to a particular economic sector (rather than indication for certain professions, which can be restrictive) or any other non-discriminatory preference. The Matching Tool then proposes a list of matching member states where the applicant can be relocated to.⁴⁷⁴ In the case of vulnerable applicants (read unaccompanied children), Recital 28 and 34 of the September Decisions, require a further assessment to determine whether the member state of relocation can provide adequate support. The Matching Tool caters for this by highlighting the cases with unaccompanied minors whereupon staff review the file and the proposed member state

⁴⁷¹ Articles 5(6) of the September Decisions.

⁴⁷² EASO 'EASO Matching Tool in support of the Relocation process' <https://www.easo.europa.eu/easo-matching-tool> (Date of use: 31 July 2017).

⁴⁷³ See the explanation under the title 'The algorithm' on EASO 'Matching Tool' [footnote 472].

⁴⁷⁴ 'The algorithm' on EASO 'Matching Tool' [footnote 472].

of relocation to ensure the provision of adequate support.⁴⁷⁵ Member states of relocation must also consider the fair sharing of vulnerable applicants between them, no doubt due to the added resources required to adequately protect and support these children.⁴⁷⁶

Let us revert momentarily to the hypothetical situation of an unaccompanied minor asylum seeker, who seems to have no family in any of the European member states and has arrived in the frontline member state A. The child has expressed a desire to be moved to member state C because he wants to attend school there as he has heard of the high standard and quality of education. He also indicates that long-time friends of his family are currently living in member state C and he would like to be reunited or be close to that family. As the point of departure, the Dublin system dictates that the child's application for international protection will be processed in the country of first entry (member state A), if it is in his best interests.⁴⁷⁷ According to the Dublin system, the views of the minor shall be taken into account in accordance with his age and maturity.⁴⁷⁸ However, his views and opinions do not demonstrate a familial link to member state C and he will not be transferred on any of the grounds of transferal in the Dublin III Regulation alone.⁴⁷⁹ Due to the high volume of arrivals that arrived in frontline member state A with the unaccompanied child, he has been identified as a candidate for relocation under the temporary European relocation scheme. The temporary scheme requires member state A to gather all relevant information about the unaccompanied child and to find a matching member state of relocation. The answer to the request for relocation depends on the child's compatibility with the member state's preferences and the member states' capability of providing adequate reception and protection facilities.⁴⁸⁰ Whether the desired member state C will be one of the possible member states of relocation is not guaranteed and in the theme of Dublin, the child is prohibited from refusing to be relocated.⁴⁸¹ It is self-evident that the vulnerability

⁴⁷⁵ See the explanation under the title 'Vulnerable applicants' on EASO 'Matching Tool' [footnote 472].

⁴⁷⁶ See under the title 'The algorithm' on EASO 'Matching Tool' [footnote 472].

⁴⁷⁷ Article 8(4) of Dublin III Regulation [footnote 17].

⁴⁷⁸ Article 6(3)(d) of Dublin III Regulation [footnote 17].

⁴⁷⁹ Those grounds are laid out in Article 8(1), (2) and (3) of the Dublin III Regulation [footnote 17].

⁴⁸⁰ In accordance with the relocation procedure in Article 5 of the September Decisions.

⁴⁸¹ Articles 5(9) of the September Decisions.

of unaccompanied minors is increased by virtue of the fact that they receive no protection from parents or guardians.⁴⁸² The apparent disregard for the minor's right to participate in arriving at decisions which affect him in the context of the situation outlined above defeats the very purpose of the best interests principle and renders the minor even more vulnerable to emotional and psychological trauma because his agency and autonomy is undermined.

5.4 The reality of the Dublin system and the temporary European relocation scheme

The Dublin III Regulation and the temporary relocation scheme together, conjure up a list of problems that affect adult asylum seekers and sadly, unaccompanied child asylum seekers too and the evidence accumulated over the last two years seems to confirm this.⁴⁸³ Without going into a full investigation of every single problem that has arisen within Dublin III and the relocation scheme, it is prudent to discuss several of these problems as they pertain to the unaccompanied child.

The first problem that arises is the simultaneous functioning of Dublin III and the temporary relocation scheme. We know that the provisions of Dublin III remain in place and that the temporary European relocation scheme, as its name suggests, is a temporary derogation therefrom.⁴⁸⁴ The two systems therefore work in parallel: on the one hand, Dublin sends asylum seekers back to the country of first entry and on the other hand, the relocation scheme identifies asylum seekers to be transferred away from the country of first entry, to alleviate pressure on that member state. During 2016, the data from Italy shows that the two systems are however, not complementary: the total number of transfers away from Italy, through Dublin and relocation, was 1864 people. The total number of transfers into Italy, through Dublin, was 2086 people.⁴⁸⁵ It is absurd that the outcome of a system, where there is a temporary derogation intended

⁴⁸² McAdam 2006 *IJCR*251 [footnote 127].

⁴⁸³ In October 2017, the Civil Liberties Committee approved proposals to reform the Dublin III Regulation in reaction to the near-collapse of the entire system during the refugee crisis. See European Parliament 'EU Asylum Policy' [footnote 438].

⁴⁸⁴ The September Decisions are valid and apply until 17 September 2017. See Articles 13 of the September Decisions.

⁴⁸⁵ Asylum Information Database (AIDA) 'The Dublin system in 2016: Key figures from selected European countries' http://s3.amazonaws.com/ecre/wp-content/uploads/2017/03/27170638/AIDA_2016Update_Dublin.pdf (Date of use: 19 July 2017).

to relieve the pressure on the frontline member states and share the protection responsibility, shows a net inflow of 222 individuals into a frontline member state. This is not to mention the incredible cost to the member states where 1864 asylum seekers are essentially being swapped between states.⁴⁸⁶ The effect is that the two systems are exchanging asylum seekers without there being a measurable difference in distribution of asylum seekers.

The second problem affecting unaccompanied child asylum seekers is the incorrect use of preferences by member states of relocation. Unfortunately, the majority of member states have manipulated the preference mechanism to their own ends.⁴⁸⁷ They submit long or constraining lists of preferences for the profile of the applicant – Germany and France persist in their preference for families⁴⁸⁸ and France specifically prefers single Eritrean women with children;⁴⁸⁹ some member states are reluctant to receive applicants of specific nationalities, single applicants or unaccompanied minors.⁴⁹⁰ There is a clear trend in the member states who do continue to accept unaccompanied minors namely, Belgium, the Netherlands, Germany, Spain and Ireland,⁴⁹¹ but this only highlights the reluctant attitude to responsibility sharing by the other member states. Hungary and Poland are clearly not showing any solidarity in sharing responsibility as they have not relocated a single person, with Poland not making a pledge since December 2015.⁴⁹²

The third problem is the failure of member states to actively, consistently and efficiently participate in the relocation scheme. The first part of this problem is the numerous incidences of lengthy response times by member states of relocation to a relocation

⁴⁸⁶ Garcés-Masareñas 'Dublin "doesn't work"' 3 [footnote 418].

⁴⁸⁷ European Commission 'First Report on Relocation and Resettlement' COM (2016) 165 final 7 http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160316/first_report_on_relocation_and_resettlement_en.pdf (Date of use: 7 June 2016).

⁴⁸⁸ Germany has persisted in its preference for families or the proof of family links from the beginning as evidenced in the First Report at 9 [footnote 487] to the Fourteenth Report at 5 [footnote 403].

⁴⁸⁹ European Commission 'Fourteenth Report' 7 [footnote 403].

⁴⁹⁰ European Commission 'First Report' 9 [footnote 487].

⁴⁹¹ European Commission 'Fourteenth Report' 5 [footnote 403].

⁴⁹² European Commission 'Fourteenth Report' 3 [footnote 403].

request.⁴⁹³ The delays are often either caused by the member state's lack of capacity to process relocation requests timeously or by the lengthy national procedures in place in the member state. The European Commission reports that delays in relocation replies in Switzerland and Estonia exceed three months.⁴⁹⁴ Delays in initiating the procedure in Dublin III are also creating gaps in the protection of unaccompanied minors. In terms of Dublin III, if there is an application for protection in a second member state and that state considers another member state responsible for examining that application, the second member state may, within three months of the application, request that other state to take charge of the applicant.⁴⁹⁵ If the second member state fails to submit a take-charge request within the three-month period, that state will be responsible for the application for protection.⁴⁹⁶ The challenges often encountered, when an unaccompanied child arrives in a member state requesting protection, are difficult to solve and take some time. A lecture on 'Effective Remedy and Dublin' as part of the project to support guardians in the Dublin system, gives several real-life examples of unaccompanied minors who found themselves in these protection gaps.⁴⁹⁷ The focus of the lecture is the absence of an effective remedy in cases concerning the best interests of the unaccompanied minor asylum seeker. The first example is Ahmed, a 14-year old boy who arrives in member state A with knowledge that his father lives in member state B but cannot give specifics as to where his father lives.⁴⁹⁸ Without any kind of proof of the relationship, the discussions between Ahmed and member state A take very long and the three-month period to issue a take-charge request expires. Member state A is now responsible for Ahmed's application for protection despite it probably being in his best interests to be reunited with his father in spite of the three-month limit. Furthermore, when member state A processes Ahmed's application for protection, he is considered as legally resident in member state A according to the Dublin system and cannot move to member state B to be reunited with his father.

⁴⁹³ European Commission 'First Report' 9 [footnote 487] and 'Fourteenth Report' 4 [footnote 403].

⁴⁹⁴ European Commission 'Fourteenth Report' 4 [footnote 403].

⁴⁹⁵ Article 21(1) of the Dublin III Regulation [footnote 17].

⁴⁹⁶ Third paragraph in Article 21(1) of the Dublin III Regulation [footnote 17].

⁴⁹⁷ Appendix V 'Speech on effective remedy and Dublin' in Lourens *et al* 'Dublin for Guardians' 75-78 [footnote 415].

⁴⁹⁸ Lourens *et al* 'Dublin for Guardians' 75-76 [footnote 415].

The next two examples given in the lecture both highlight the failure of member states to cooperate in a meaningful way that seems to trump the best interests of the unaccompanied child.⁴⁹⁹ The case of Munya and Sahar reveals the lack of solidarity amongst member states. The two boys arrive in member state A and request to be reunited with their 20-year old brother in member state B. However, member state B refuses to accept responsibility for processing their application on the basis that the older brother does not fulfil the requirements of a 'family member' as contained in Article 2(g) of Dublin III Regulation and that he should not be imposed upon with the responsibility as guardian of the boys. The young boys therefore have no effective remedy against the decision by member state B, despite it certainly being in their best interests to be reunited with their consenting brother when their father is deceased and their mother remains in their country of origin.⁵⁰⁰

The second part of the problem is the unjustified rejection by member states of relocation. There is evidence of member states rejecting a request on the basis that it is not in line with their specified preferences.⁵⁰¹ The September Decisions do not allow this type of rejection. Article 5(7) specifically provides that there may be a refusal to relocate

only where there are reasonable grounds for regarding him or her as a danger to their national security or public order or where there are serious reasons for applying the exclusion provisions set out in Articles 12 and 17 of Directive 2011/95/EU.⁵⁰²

The case of Munya and Sahar is a good example of unjustified rejection to a relocation request because despite the older brother's consent and the boys' desire to be reunited, member state B refused to accept responsibility. It seems to be a persistent problem since the inception of the relocation scheme, where some member states also broadly rely on nebulous issues of national security, public order or the exclusion provisions

⁴⁹⁹ Lourens *et al* 'Dublin for Guardians' 76 where the case of Irina is discussed as well as the case of the brothers Munya and Sahar [footnote 415].

⁵⁰⁰ Lourens *et al* 'Dublin for Guardians' 76 [footnote 415].

⁵⁰¹ European Commission 'Fourteenth Report' 7 [footnote 403].

⁵⁰² Articles 12 and 17 of the Qualification Directive [footnote 26] lists exclusions such as already having protection from a UN organisation, having committed an international crime or a serious crime or is avoiding sanction for committing a crime.

provided by the Qualification Directive.⁵⁰³ The rejections come without specific justifications, which the European Commission reaffirms as not being in line with the September Decisions on relocation nor is it in the spirit of loyal cooperation or solidarity.⁵⁰⁴

5.5 Does Dublin and the temporary European relocation scheme assist in finding durable solutions?

It should be recalled that the aim of identifying a durable solution for an unaccompanied child is to address all their protection needs, in a way that the child's views feature prominently and that ultimately leads to the end of the child being unaccompanied. A true durable solution must be implemented timeously in a manner that promotes the full development of the child, be tailored to the best interests of the child and be a long-term response to the needs of the child.⁵⁰⁵ In order to attain this level of durable solution, member states should rely on the four foundational principles as set out by the Committee on the Rights of the Child.

Before the member state authorities can initiate the procedure to determine and implement the best durable solution for the unaccompanied child, there has to be a final determination of the member state responsible for the application for international protection. In this case, either the Dublin system or the temporary relocation scheme could apply to the unaccompanied child, depending on the circumstances. Since the time-sensitive determination of the responsible member state precedes⁵⁰⁶ the best interests determination (BID) to find a durable solution, does the decision regarding the responsible member state impact the eventual durable solution? If the answer to this question is yes, then according to the Committee, such a major decision requires a greater level of protection and detailed procedures to consider the best interests of the child.⁵⁰⁷ Furthermore, we not only distinguish the child subject to the Dublin system

⁵⁰³ European Commission 'First Report' 10 [footnote 487] and 'Fourteenth Report' 7 [footnote 403].

⁵⁰⁴ European Commission 'First Report' 10 [footnote 487].

⁵⁰⁵ See the discussion of the elements of a durable solution in 4.3.1 to 4.3.3 of this paper.

⁵⁰⁶ The specific articles that apply to each situation is discussed below in 5.5.1 and 5.5.2.

⁵⁰⁷ Paragraph 20 of General Comment No. 14 [footnote 196].

versus the temporary relocation scheme, but we must also distinguish the child who has family in Europe from the child who does not.

5.5.1 The unaccompanied child with family or relatives present in Europe

The primary consideration in determining the responsible member state for an application by an unaccompanied child in the Dublin system is the legal presence of a family member, sibling or relative in a member state.⁵⁰⁸ As part of the guarantees for minors in the Dublin system, the member state where the unaccompanied child lodged the application should take appropriate action to identify family members, siblings or relatives of the unaccompanied child.⁵⁰⁹ Once a particular member state is considered responsible on these grounds, the take-charge request should be submitted within three months of the application being lodged.⁵¹⁰ If, for some reason, the take-charge request fails to be submitted within three months, the responsible member state will be the one where the application for protection was lodged.⁵¹¹ We saw that this was the case with Ahmed and with the brothers, Munya and Sahar. Now that the first member state is responsible for the respective applications, we know that part of providing international protection to children is the provision of durable solutions. Chapter four of this paper has established a clear link between the preceding formal best interests determination and the identification of a durable solution.⁵¹²

If we remain focused on the respective situations of Ahmed and Munya and Sahar, the next step by the authorities of the responsible member state will be the BID and to that end, the Committee provides that the act of tracing family should be prioritised.⁵¹³ As we know from the discussion regarding the BID, it is a comprehensive, formal assessment that records the identity of the child, the unique situation of the child, his or her views, particular vulnerabilities and individual needs. Even though the BID and processing of the unaccompanied child is a priority reflecting the importance of time,

⁵⁰⁸ Article 8(1) and (2) of the Dublin III Regulation [footnote 17].

⁵⁰⁹ Article 6(4) of the Dublin III Regulation [footnote 17].

⁵¹⁰ Article 21(1) of the Dublin III Regulation [footnote 17].

⁵¹¹ Third paragraph of Article 21(1) of the Dublin III Regulation [footnote 17].

⁵¹² UNHCR *Safe & Sound* 20 [footnote 305].

⁵¹³ Paragraph 79-80 of General Comment No. 6 [footnote 179].

the child needs to be given adequate time to place his trust in the guardian or representative, to rest and recuperate and to allow the child to properly express his views and to be heard.⁵¹⁴ In Ahmed's case, one should appreciate that a young boy will need the time to understand that he will not be stuck in the first country and that hopefully he will be reunited with his father in the second member state but that the authorities need time to trace his father properly. Should the three-month time limit under Dublin III lapse, the authorities will then have to process the application for protection and attempt to trace Ahmed's father in terms of the process for determining a durable solution. Naturally, the processing times for finding durable solutions for unaccompanied children varies between member states resources and similarly, depends on the time it takes to trace the family. In the case of Ahmed, reunification with his father may be possible as a durable solution in terms of the Family Reunification Directive.⁵¹⁵ The difficulty lies in the fact that member state A is tasked with this responsibility under the Dublin III Regulation, which essentially forces the authorities to act as middle man in the exchange of information with member state B.

To answer the question whether Dublin III assists in finding a durable solution in this particular situation, the simple answer is no. The short amount of time afforded for family tracing, the unfair reliance on the unaccompanied child to provide substantial proof of the whereabouts of their family and the systems in place for the exchange of information between member states does not assist in finding durable solutions. Article 6(4) of Dublin III provides that a 'Member State may call for the assistance of international or other relevant organisations' when tracing family. The result of this provision is the tremendous variation in the methods used by member states in tracing family. In some instances, there is reliance on organisations such as the Red Cross, various NGOs, social welfare services and immigration authorities.⁵¹⁶ Member states have also directly interacted with other member states in family tracing.⁵¹⁷ Shockingly,

⁵¹⁴ UNHCR *Safe & Sound* 41 [footnote 305].

⁵¹⁵ Council of the European Union Directive 2003/86/EC of 22 September 2003 on the right to family reunification 3 October 2003 OJ L251.

⁵¹⁶ European Commission 'Evaluation' 18 [footnote 416].

⁵¹⁷ In Finland, the interaction with other member states is based on any substantial information that the child may provide to the authorities. See European Commission 'Evaluation' 18 [footnote 416].

Greece and Cyprus place the burden of family tracing on the unaccompanied child, with assistance from social services and the Red Cross.⁵¹⁸ But the overwhelming conclusion by most NGOs and legal representatives involved is that the family tracing process is mostly unsuccessful.⁵¹⁹

On the other hand, if the unaccompanied child has family, siblings or relatives legally present in Europe, other than in Greece or Italy, then the temporary relocation scheme will not apply to these children. This is because according to the scope of the September Decisions, relocation will only take place when two conditions are met: first, an application for international protection has been lodged in Italy or Greece and second, those states would have been responsible for processing the applications in terms of the criteria in the Dublin III Regulation.⁵²⁰ Article 8 of Dublin III directs that the member state responsible shall be that where the family, siblings or relatives are legally present, if it is in the best interests of the child and represents a durable solution. Although, if the family is present in Greece or Italy, and the unaccompanied child is reunited with them, the entire family could be subject to relocation under the scheme.

5.5.2 The unaccompanied child without family or relatives present in Europe

According to the Dublin III system, the member state responsible for an unaccompanied child without family legally present in Europe will be that where the child lodged his or her application for international protection.⁵²¹ Article 8(4) of Dublin III is, however, conditional upon the best interests of the child. In this case, the best interests of the child will be considered in terms of a best interests assessment (BIA) and will not be the more formal BID. The BID is reserved for the process of finding a durable solution, once the unaccompanied child has been granted international protection. It is therefore, highly unlikely that the unaccompanied child will be transferred away from the first member state to a second, preferred member state on the outcome of the initial best

⁵¹⁸ This may be inconsistent with Article 6(2) of the Dublin III Regulation which requires the member state to ensure that a representative 'represents and/or assists an unaccompanied minor with respect to all procedures provided for in this Regulation.'

⁵¹⁹ European Commission 'Evaluation' 18-19 [footnote 416].

⁵²⁰ Articles 3(1) of the September Decisions.

⁵²¹ Article 8(4) of Dublin III Regulation [footnote 17].

interests assessment. Indeed, the European Commission's approach is straightforward in that there are no exceptions: if there is no family, the responsible member state is the one where the application is lodged.⁵²²

The question that now arises is whether during the best interests assessments and later, the best interests determination to find a durable solution, the child could be transferred to the member state that he or she strongly prefers for whatever reason. In other words, will the balancing and consideration of the child's views, future prospects, cultural ties established during the BID be enough to find a durable solution that transfers him to the member state he desires to end up in? The likely answer to this is negative since there are only five suggested durable solutions for an unaccompanied child covered by the Committee: (1) family reunification in the country of origin, in the country of destination or in a third country; (2) voluntary repatriation of the child to his country of origin; (3) local integration of the child in the host society; (4) resettlement of the child in a third country and (5) inter-country adoption.⁵²³ In the earlier hypothetical example of the unaccompanied child who lodges his application in member state A but expresses his strong desire to be transferred to member state C to reunite with long-time family friends and to obtain a better education, the solutions (1), (2) or (3) are either not possible or not desirable. Solution (4) is also legally probably not possible. The Committee directs in General Comment No. 6 that resettlement may be a durable solution for the child who cannot return to their country of origin and for whom no durable solution can be envisaged in the host country.⁵²⁴ The Committee goes on to specify that resettlement is aimed at the child who is at risk of refoulement, persecution or other serious human rights violations.⁵²⁵ The UNHCR confirms this approach when considering resettlement as a durable solution: resettlement must only be an option after a BID has been conducted and it is found that the child is at serious risk with no other protection interventions available in the country of asylum.⁵²⁶ This latter specification will not be applicable to the unaccompanied child who finds himself in

⁵²² European Commission 'Evaluation' 27 [footnote 416].

⁵²³ Paragraphs 79-94 of General Comment No. 6 [footnote 179].

⁵²⁴ Paragraph 92 of General Comment No. 6 [footnote 179].

⁵²⁵ Paragraph 92 of General Comment No. 6 [footnote 179].

⁵²⁶ UNHCR 'Resettlement' 1 [footnote 316].

overstretched Hungary, for example, but wishes to be transferred to Luxembourg. It would seem that for an unaccompanied asylum seeker child with no family present in Europe, the determination of the responsible member state under Dublin III finally determines the geographical location of the child and not the latter durable solution.

To the extent that the unaccompanied child lodges his application in Greece or Italy and, under Dublin III, either member state would be responsible for their application for protection, the unaccompanied child would be a candidate for relocation under the temporary European relocation scheme. In that case, a best interests assessment will be conducted in accordance with the guidelines contained in the Dublin III Regulation.⁵²⁷ In the Fourteenth Report on Relocation and Resettlement, the European Commission states '[i]t is the Best Interests of Child Assessment that determines first, if the minor should be relocated, and second to which Member State.'⁵²⁸ What is revelatory about this statement is the application of the best interests assessment: it concerns first, *if* the minor should be relocated – not a more general best interests assessment that looks at the particular situation of the minor, his participation, his subjective preferences, his future development and survival. In this study we have established that the BIA, by its very nature, is an initial step taken before process planning and the later BID to find a durable solution.⁵²⁹ The intent of the BIA is to collect information and explore relevant factors that are specific to the situation of that child, without the need for lengthy interviews. Thereafter, authorities are to approach the best interests of the child in a holistic way, where various experts can express their views on the weight and importance of the factors. The best interests assessment loses the holistic approach when the focus is on *if* the child should be relocated to a compatible member state. The expression 'putting the cart before the horse' or 'the tail wagging the dog' find resonance in this circumstance. In the current migratory crisis, the question of relocation is down to a handful of objective factors: the nationality of the asylum seeker, whether they hold the nationality that is currently being relocated (Eritrea,

⁵²⁷ That is, in terms of Article 6 and 8 of the Dublin III Regulation [footnote 17].

⁵²⁸ European Commission 'Fourteenth Report' 5 [footnote 403].

⁵²⁹ Refer to 4.3.2 of this paper for the full discussion of the BID.

Bahamas, Bahrain, Bhutan, Qatar, Syria, United Arab Emirates and Yemen);⁵³⁰ their family being present in another member state; and the objective compatibility with the member states who have pledged spaces.

On the face of it, an assessment of the best interests of the child meets the requirement of participation because there is a conversation between the authorities and the child in the BIA process. The problem is that even if the child expresses his wish to be reunited with family friends in member state C and his views are given due weight in member state A, if member state C has not made pledges for unaccompanied children, the child will not be able to relocate there. The focus is therefore, whether the minor should be relocated at all and then, to which member state. Moreover, of the suitable member states who are willing to accept the minor, it is the objective assessment whether the proposed member state can provide adequate support that makes the final decision in relocation.⁵³¹ Again, it comes down to the assumption of equal protection in European member states which is just not reality. The child relocated to Hungary for example, is faced with poor integration and an education system that is separate from the schools for nationals of Hungary, whereas the child relocated to Germany, Austria or Sweden is placed in specialised integration and language schooling before being introduced to the mainstream schools and community.⁵³² Sweden has actually managed to arrange schooling for unaccompanied children within one month of their arrival.⁵³³

The fundamental problem with the relocation scheme is that the decisions to relocate are being made before the formal best interests determination is being conducted. The result is that once the child has been relocated, the authorities of the relocation state conduct the BID and attempt to find a durable solution for the child. The scheme ignores the evidence that if the intended end user is involved at all levels of decision-making and their views are given proper consideration and due weight, their cooperation and later development is of greater value.⁵³⁴ The priority is not on finding out what the

⁵³⁰ EASO 'Questions and Answers on Relocation' <https://www.easo.europa.eu/questions-and-answers-relocation> (Date of use: 14 August 2017).

⁵³¹ EASO 'Matching Tool' [footnote 472].

⁵³² FRA 'Key migration issues' 11-12 [footnote 391].

⁵³³ FRA 'Key migration issues' 11 [footnote 391].

⁵³⁴ UNICEF 'Evolution' 5 [footnote 147].

unaccompanied child wants, being to fit in and build a future for himself, although this is precisely what the priority should be. The Dublin tradition dictates that the person to be relocated has no right to choose the relocation state or even to refuse relocation;⁵³⁵ the priority is rather, whether member states deem certain categories of asylum seekers better suited to enter their country and receive asylum. This still leaves all non-suited asylum seekers in the frontline member states to be processed.

5.6 Conclusion

It is well documented that the EU asylum procedures were not able to handle the massive refugee movement and thus the need for activation of emergency relief. A crisis may lead to temporary processes being implemented, such as the temporary relocation decision, but these decisions do not permit the negation of the strict and binding obligations contained in the CRC. The European member states however, have not sufficiently been able to handle the task of catering for the unaccompanied child. The best interests principle has been included in the temporary legislation and yet member states have been left to their own devices when it comes to the establishment of proper procedures for the processing of unaccompanied children. Member states have also been able to provide their preferences with regard to whom they wish to accept in the relocation scheme. The key objective in allowing states to express their preferences is to facilitate the integration of those relocated persons. However, a number of member states have actually used the preferences as a way to exclude candidates rather than a way to establish a good matching process. Unfortunately, unaccompanied refugee children are not a high priority and some states have blatantly refused to accept them. This type of manipulation not only affects solidarity between member states but also has a major impact on the process of finding durable solutions for unaccompanied children, with or without family in Europe.

⁵³⁵ European University Institute: Migration Policy Center 'Hotspots and Relocation Schemes: the right therapy for the Common European Asylum System?' <https://blogs.eui.eu/migrationpolicycentre/hotspots-and-relocation-schemes-the-right-therapy-for-the-common-european-asylum-system/> (Date of use: 26 July 2017).

The temporary relocation scheme is supposed to relieve the pressure from the facilities in Greece and Italy and to better integrate asylum seekers once they have obtained refugee status. From this analysis, the temporary relocation scheme has done very little in achieving these objectives for unaccompanied children. Only certain nationalities of unaccompanied children benefit from the scheme. As such, their relocation depends on their compatibility with the member states who have pledged and not the other way around. More alarming is the fact that the decision to relocate the child does not require an in-depth best interests determination despite the finality of the relocation decision. It seems that a child who has no family and therefore wholly relies on the protection by member states is in the position where adults make decisions for the child that has nothing to do with the wishes of the child. The decision for relocation is informed by member states alone.

Chapter Six: Conclusion and Recommendations

6.1 General conclusion

This study set out to determine the effect of the temporary relocation scheme in the search for durable solutions for the unaccompanied child. What was established is that the scheme seems to be a way for member states to share responsibility in a way that suits them first. The effect is that it gives member states the opportunity to pick the asylum seekers who they deem able to integrate into their society rather than having Europe, as a whole, address all unaccompanied children from the position demanded by the CRC.⁵³⁶ That is to say, we would like to protect you while you are away from your home country, your family and your stable environment but in order to do that, we need your participation to know what is in your best interests first.⁵³⁷ Since durable solutions effectively determine the future geographic location of the refugee child, the final decision under the relocation scheme ultimately determines the host society for the local integration of the child. The decision, as we established in 5.5 of this paper, is made under time constraint, without the need for a formal best interests determination, despite the knowledge that a BID is a prerequisite in finding a durable solution and the Committee's reiteration that a greater level of protection and procedure is needed.

6.2 International and regional protection systems

The words of the poet Warsan Shire that 'no one puts their children in a boat unless the water is safer than the land'⁵³⁸ resonates deeply during the refugee crisis of 2015. In chapter 1, specifically section 1.3.2, we discussed the sheer number of arrivals to the shores of Europe which quickly placed pressure on the facilities and resources for their processing. It also placed pressure on the asylum and refugee legal system that was built to protect those who experienced persecution or a violation of the rights and freedoms held dear by Europe. All asylum seekers – adults and children alike – are

⁵³⁶ Refer in particular to the discussion of an unaccompanied child without family or relatives present in Europe in section 5.5.2 of this paper.

⁵³⁷ In accordance with the four guiding principles in the CRC and identified and discussed at length by the Committee. See section 3.3 of this paper on the four foundational principles.

⁵³⁸ Excerpt from the poem by Shire W 'Home' <https://genius.com/Warsan-shire-home-annotated> (Date of use: 31 August 2017).

subject to the Common European Asylum System; a system that is aimed at setting out the common standards for all EU member states to ensure fair and equal treatment during the asylum process. The CEAS, traversed in chapter 5.2 hereof, presupposes that the asylum seeker will receive the same high standard of protection no matter which member state he or she enters and initiates their application for refugee status in. As such, secondary movements or asylum shopping is prohibited. It is precisely this aspect of the CEAS that nearly collapsed under the unprecedented flow of asylum seekers into Italy and Greece. In a bid to save the asylum process in Italy and Greece and to prevent further tragic events in the Mediterranean, the Council of the European Union adopted the temporary European relocation scheme.

The temporary relocation scheme applies to asylum seekers who register in Greece or Italy as their country of first entry and whose application for international protection would normally be processed there. We saw in chapter 5.4 that there is however, this paradoxical interaction in the legislation between the Dublin III Regulation and the temporary relocation scheme, particularly for the unaccompanied child. For the most vulnerable asylum seeker, the unaccompanied child without family legally resident in Europe and who is wholly dependent upon member states for the rest of his childhood years, there are two situations, both of which were investigated in section 5.5.2 of this paper. The first, under the Dublin III Regulation, is that if the country of first entry is one other than Greece or Italy, that will be the member state responsible for the asylum application and the geographic location for the durable solution. The second, under the relocation scheme, is that if Greece or Italy would ordinarily be responsible for the child's asylum application, the child may be relocated to another member state, if that child is deemed compatible with the receiving member state's preferences. The receiving member state will be the geographic location for the durable solution. Bizarrely, we found toward the end of section 5.2.2 of this paper, that the system, as it stands, is more helpful to the lone unaccompanied child who risks illegal travel to his desired destination member state because according to the case law, member states are barred from initiating a Dublin transfer back to the country of first entry.

In section 3.3 of this paper, we confirmed that the obligations and duties that European states take on under the CRC are onerous, precisely because the rights of children are

as equal and inalienable as the rights of all humans, in addition to extending particular care to the child. In 2003, the Committee found it essential to publish a general comment focusing on the manner by which states can develop their general measures of implementation of the CRC.⁵³⁹ This document, and the others that followed, solidified the Committee's position as regards the utmost importance of the obligation on states to take action to ensure the realisation of all rights in the CRC, for all children in their jurisdiction. It is therefore incumbent upon all member states of the EU to ensure proper implementation of the rights of children in all actions, including in the fields of asylum, refugee law and international protection. True implementation of the rights in the CRC requires more than token reference to the best interests of the child being a primary consideration. In the discussion on true implementation of the CRC, we discovered that it requires an approach in legislation that enables a thorough consideration of the best interests of the child, where the child is actively participating and his views seriously considered, for the full enjoyment of all rights and the development of the child.⁵⁴⁰ The problem is that when it comes to general migration control, the contemporary EU policy seems to reflect the issue of political will rather than protection of vulnerable people.

6.3 The effect of the temporary European relocation scheme

We reflected, in chapter 1 and section 5.4, on the arguments for the adoption of the temporary relocation scheme are that it provides the necessary relief to the frontline member states' facilities, it establishes a system of cooperation and shared responsibility between European countries, and it streamlines the processing of asylum claims. The scheme is merely one part of the system that should provide international protection and only applies to a narrow group of asylum seekers who qualify. For the doubly vulnerable asylum-seeking child, the system should be free of the political will characteristic of migration control. The asylum and refugee protection system should be cohesive, with a suitable and durable end solution that is long-term and adaptable to the evolving protection needs of the child. This, therefore, requires that protective

⁵³⁹ See the discussion on the general children's rights implementation obligations of states in section 3.2 of this paper.

⁵⁴⁰ See the discussions in chapter 4, specifically the elements of durable solutions in 4.3.1 to 4.3.3.

actions flow into one another and not frustrate the subsequent steps or the attainment of durable solutions.

6.4 Some suggestions

During the research of this paper, there was always evidence of poor integration and protection of asylum-seeking children in various member states. It seems that most of the negative attitudes toward these children stems from the negative rhetoric on adult asylum seekers. On the flip side of the coin, Europe is in a demographic decline, with its population ageing and child population contracting. It therefore, seems plain that an investment in the education, nurturing and integration of the unaccompanied children seeking a better future in Europe, is an investment in the future of Europe.⁵⁴¹ Farrugia and Touzenis expressed an interesting idea for the future protection of refugee children: establish a completely separate and distinct asylum system for children.⁵⁴² In this way, the needs of children will remain separate from those of adults in the immigration context. Indeed, if there is a separate legal instrument for the rights of children in the CRC, why should there not be a separate instrument for the international protection of asylum and refugee children. At the very least, in a recent publication by the European Parliament, the proposal for a change in the Dublin system seems to be moving in the rights-based direction. The proposal is for a 'rights-based, dignity-oriented approach following the "Dublin without coercion" paradigm.'⁵⁴³ The suggestion is for asylum seekers to have their reasonable relocation preference taken as priority in the decision-making process. There are various positive developments in such an approach including mutual trust and cooperation, as well as the fact that it enhances integration potential and reduces the chances of risky secondary movements. In short, an approach that venerates the four fundamental principles of the CRC.

⁵⁴¹ UNICEF 'Uprooted' 96 [footnote 9].

⁵⁴² Farrugia and Touzenis *Protection of Migrant Children* 51 [footnote 386].

⁵⁴³ European Parliament 'Implementation of the 2015 Council Decisions' 69 [footnote 151].

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